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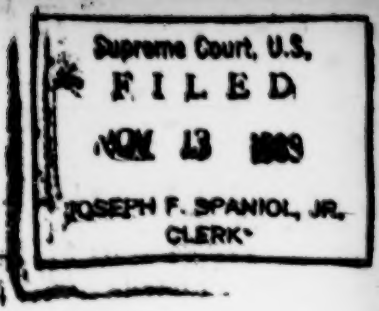

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

ROBERT ALTON HARRIS,

PETITIONER,

v.

R. PULLEY, WARDEN OF SAN QUENTIN,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I. WAS PETITIONER'S DEATH SENTENCE UNCONSTITUTIONALLY IMPOSED UNDER A JURY INSTRUCTION WHICH PERMITTED AND PROSECUTION EVIDENCE AND ARGUMENT WHICH URGED THE JURY TO CONSIDER PETITIONER'S MENTAL DISORDER AS AN AGGRAVATING FACTOR WARRANTING THE DEATH PENALTY?

II. DID THE NINTH CIRCUIT VIOLATE PETITIONER'S CONSTITUTIONAL RIGHTS IN HOLDING THAT THIS COURT'S DECISION IN McCLESKEY V. KEMP 481 U.S.__, 107 S.Ct. 1756 (1987), PRECLUDED DISCOVERY AND AN EVIDENTIARY HEARING TO DEVELOP HIS FEDERAL HABEAS CLAIMS OF UNCONSTITUTIONAL RACE, GENDER AND AGE DISCRIMINATION AS THE 9TH CIRCUIT ERRONEOUSLY HELD?

III. MAY CALIFORNIA CONSTITUTIONALLY PERMIT THE AGE OF A DEFENDANT TO BE USED BY THE SENTENCING AUTHORITY AS AN AFFIRMATIVE REASON TO IMPOSE THE DEATH PENALTY?

IV. MAY CALIFORNIA DENY AN INDIGENT CONDEMNED PRISONER'S TIMELY REQUEST FOR FUNDS FOR A NEUROLOGICAL EXAMINATION (DESPITE AN EXPERT SHOWING OF EVIDENCE INDICATING BRAIN DAMAGE NEVER PRESENTED TO THE SENTENCING JURY) SO AS TO AID IN HIS POST-CONVICTION DEMONSTRATION OF LONG-EXISTING ORGANIC BRAIN DAMAGE TO SUPPORT HIS CLAIM OF INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL?

V. WHEN PRE-TRIAL PUBLICITY IS CREATED BY FEDERAL AND STATE PROSECUTORS AND THE COMMUNITY IS SATURATED WITH INFLAMMATORY PUBLICITY, SHOULD THE PRESUMPTION OF PREJUDICE BE INVOKED WHEN THERE IS EVIDENCE OF ADVERSE IMPACT OF THE PUBLICITY ON THE JURY VENIRE?

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PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Petitioner, Robert Alton Harris, requests that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Ninth Circuit in **Harris v. Pulley,** 852 F.2d 1546 (9th Cir. 1988), as amended on September 28, 1989.

OPINION BELOW

The Opinion of the Court of Appeals affirmed the judgment of the United States District Court denying all relief in habeas corpus to Petitioner and is officially reported at 852 F.2d 1546 (9th Cir. 1988). A copy of the Opinion is attached as Appendix A. In its September 28, 1989, order denying the petition for rehearing, the court amended the original opinion and those amendments are attached as Appendix B.

STATEMENT OF JURISDICTION

On 8 July 1988, the Court of Appeals entered judgment affirming the orders of the United States District Court. On September 28, 1989, the petition for rehearing and suggestion for rehearing **en banc** were denied, the latter by majority vote of all active judges (Appendix B). By separate order on October 3, 1989, the court recalled and stayed its mandate thirty days. This Court's jurisdiction to review the judgment of the Court of Appeals is conferred by 28 U.S.C. 1254(1).

FEDERAL RULES INVOLVED

Constitution of the United States of America

5th Amendment - Due Process of Law

8th Amendment - Cruel or Unusual Punishment

14th Amendment - Equal Protection

STATUTES INVOLVED

Former California Penal Code section 190.3.

It is to be noted that on June 16, 1989, this Court granted certiorari in **Boyde v. California** (1988) 46 Cal.3d 212 (No. 88--6613) to review California's 1978 death penalty statute. One of the two issues is: "Does California's capital sentencing proceeding accord with principles expressed by this court in **Lockett v. Ohio**, 438 U.S. 586 (1978), when it limits the sentencer's consideration of mitigating factors to those that extenuate the gravity of crime, and fails to advise jurors that defendant's character and record should be examined for compassionate factors that may reduce his individual culpability to the extent that a sentence less than death is the appropriate punishment?" 45 CrL 4067-68.

The 1977 statute under which petitioner was sentenced has the same defect as the 1978 statute. Both statutes allow mental condition and age of the accused to be deemed

aggravating factors to support a death verdict. Whereas in **Boyde** the argument is that the statute does not permit available mitigation to be meaningfully weighed by the jury, here the error is more egregious in that the statute allowed the State to take constitutionally mandated mitigating evidence such as mental disorder and age, and use it as aggravating evidence and argument to support a death judgment.

STATEMENT OF THE CASE

1. Procedural History. Petitioner was convicted on two counts of murder in violation of California Penal Code § 189, and 190.2 subdivision (c) (3) (i) and subdivision (c) (5). Six special circumstances were found true: two involving multiple murder (former section 190.2(c)), two for murder during a robbery (former section 190.2(c)(3)(i)), and two for murder during a kidnap for purposes of robbery (former section 190.2(c)(3)(ii) (CT

727-730; 734-36).[1]

The California Supreme Court affirmed the convictions and death judgment (**People v. Harris,** 28 Cal.3d 935 (1981). In 1982, petitioner filed a petition for a federal writ of habeas corpus in the Southern District of California (No. 82-0249 E (M)) pursuant to 28 U.S.C. §2254 [hereinafter referred to as **Harris I**]. It was denied summarily. The Ninth Circuit Court of Appeals affirmed in part and reversed in part in 1982. **Harris v. Pulley**, 852 F.2d 1542. The State took one issue decided adversely to it to this Court, and in **Harris v. Pulley**, 465 U.S. 37 (1984), this Court reversed the Ninth Circuit decision on the constitutional requirement of proportionality review in capital cases.

Petitioner filed a second federal habeas

[1] "CT" refers to the clerk's transcript at the state trial and "RT" references are to the State trial transcript. "E.C.R." refers to the Excerpt of Clerk's Record filed below.

petition [**Harris II**] in August of 1982 which was ordered consolidated with **Harris I** for hearing following the remand from the Ninth Circuit on the latter. The district court denied all relief and in 1988 the Ninth Circuit affirmed the judgment of the district court. Exhibit A, 852 F.2d 1152. On September 28, 1989, the same court issued an order denying the petitioner's petition for rehearing and suggestion for rehearing **in banc.** Ex. B.

2. Penalty Phase Facts Relevant to this Petition. After the prosecutor's penalty phase case in aggravation was completed, petitioner put on an extensive case in mitigation focussing primarily on his admission of guilt and his remorse for the offenses, and on the shockingly inhuman conditions of his upbringing.

Petitioner testified in his own behalf in the penalty phase. He admitted that he

committed the murders. He testified that it was hard for him to explain what happened, but that he did not intend to kill the victims. He wanted to use their car. They talked for approximately fifteen to twenty-five minutes, at which time petitioner told them to go up into the hills. The victims turned around and started walking, there was a shot, and the next thing petitioner knew he was shooting the victims. He testified he was genuinely sorry for having committed the murders (RT 4386-4387).

Michael Mendoza, a deputy sheriff, testified that he talked to petitioner while he was in custody awaiting trial (RT 4580). He wanted to find out something about petitioner's emotional make-up, as he had cut his wrists and stabbed himself with a pencil. He asked petitioner whether he was serious about killing himself and whether he felt he should die. Petitioner said he was willing to

pay for what he had done and appeared remorseful (RT 4583).

Petitioner's mother testified to petitioner's wretched upbringing (RT 4600-13). His sister, Barbara Jean Harris, also testified to an upbringing characterized by violence against petitioner (RT 4616-18).

Petitioner's mother testified to petitioner's premature birth (he weighed less than four pounds, RT 4600). She described the violence of petitioner's father toward him (RT 4603) including one time when petitioner was about two and was punched so hard he was knocked out of his high chair (RT 4603). Petitioner's sister, Barbara, testified to her father's abuse of petitioner (RT 4615). She too described the incident when as a toddler petitioner was struck at the dinner table. His chair fell over, "he was in convulsions and there was blood coming out of his mouth, his nose and his ears. . . he [petitioner's

father] started strangling Robbie [petitioner] with a table cloth and he was choking him and he said, 'Oh, lookie Evelyn, your baby is bleeding to death'" (RT 4617-18). Thereafter, as petitioner was growing up, his father beat him "into unconsciousness several times" (RT 4621). She remembered another time where the father lined all the children up and identified those he believed were conceived by him: "[H]e kicked. . . Robbie [then age 8] and knocked him in the bedroom and he says, 'I know that he isn't mine,'. . . " (RT 4622). "He swore up and down Robbie didn't belong to him, and that's why he was mean to him" (RT 4624).

As part of the State's rebuttal evidence, the prosecutor called Dr. Wait Griswold, over petitioner's objection, to establish that petitioner suffered from an anti-social personality mental disorder and therefore could not feel remorse (RT 4639).

Dr. Griswold then gave the jury his "diagnosis" of petitioner as an "antisocial personality" (RT 4650), "normally referred to as the sociopathic or psychopathic personality" (RT 4651). Dr. Griswold bolstered his diagnosis by specific reference to the primary medical reference, the "DSM" (RT 4664). Dr. Griswold often used the term "diagnosis" in describing petitioner's mental disorder (see RT 4560, 4655, 4656), a word commonly understood as the recognition of the nature of a diseased condition after careful medical examination and indicating petitioner suffered from a medically-recognized mental disorder.

Dr. Griswold testified that a sociopath is characterized as:

> . . . immature, emotionally unstable, they're callous, rather rigid at times, they're irresponsible, impulsive, egotistical, somewhat passively aggressive at times; they seem to have an inability to profit from

past experience or punishment. They have a very low frustration scale, and they tend to rationalize in order to explain their behavior and their difficulty.

Q Would you explain that a little further, Doctor; what do you mean by rationalizing to explain their behavior?

A Well, they will tend to project the blame on someone else and say, oh, no, this is not my responsibility, I'm not responsible for that, this is all due to another set of circumstances or all due to another person.

Projection is on someone else. (RT 4651; emphasis added).

* * * * *

Q Doctor, in dealing with the sociopath, is it at all common to find them engaging in efforts to manipulate others?

A Quite often they will, yes.

Q Is that a common feature?

A Very common.

Q How do they -- what would be examples of how they would, in your experience, tend to manipulate people?

A Well, they do it by lying, by trying to present themselves in

a good light, by ingratiating themselves with prison personnel, by other times making what appear to be suicidal gestures in order to call attention to themselves or to manipulate themselves out of a difficulty or unpleasant environment.

Q It is uncommon to find what you call suicidal gestures among sociopaths?

A Oh, no, they are quite common.

Q In reviewing Mr. Harris' history, as you have testified to, and the reports from the jail, did you see evidence of suicidal gestures?

A They appeared to be gestures, yes (RT 4652-3; emphasis added).

* * * * *

Q Now, if a person were truly a sociopath and had committed the crimes of the type that you discussed with Robert Harris, would you expect that person to truly feel remorse for those crimes?

A No, I would not.

Q Would that person be expected to feel remorse for himself for having been arrested?

A Oh, yes.

Q Would you expect that person to have remorse or concern for having been arrested?

A Yes.

Q How about for the killing of the victims, would you anticipate a person of the type that you have been testifying to have any true remorse for the killing of the victims?

A No, I would not (RT 4655-6; emphasis added).

The doctor also opined that petitioner appreciated the criminality of his conduct, had the capacity to control his conduct, knew what he was doing and had the capacity to premeditate and deliberate (RT 4656).

Dr. Griswold spent a total of 90 minutes with petitioner (RT 4657) on July 6, 1978. He never saw him again. He did not sit through or read petitioner's penalty phase testimony (RT 4674). He testified that the petitioner's mental disorder is most probably "a result of the manner in which a person is brought up -- particularly his early years. . . ." (RT

4673). During his interview with him, petitioner came close to tears as he described his childhood, but, said the doctor, this was due "to his concern about his current situation that he found himself in" (RT 4685) rather than anything else.

Dr. Griswold stated that his diagnosis of anti-social personality disorder was recognized by the DSM under 301.7 (RT 4687),[2] but both the doctor and the prosecutor frequently used the more pejorative terms of "sociopath" or "psychopath" during the doctor's testimony (e.g., RT 4651, 4652, 4654, 4655, 4675), and over defense objection (RT 4654-55). The doctor testified the disorder was frequently connected with criminal conduct (RT 4654).

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[2] The doctor testified the diagnosis is classified in the APA Diagnostic and Statistics Manual (II) under the heading of mental disorders, although it is different from neurosis and psychosis (RT 4664). This is "nomenclature put out by the American Psychiatric Association" (RT 4650).

At the penalty phase of petitioner's trial, no evidence of brain damage was proffered or received. Yet, on February 22, 1971, an EEG test had been performed on petitioner while he was in federal custody at Springfield, Missouri. The results of the examination revealed an abnormal EEG. Specifically, the abnormality was described by Doctor Joseph Alderete (Chief Medical Officer and Electroencephalographer at the Bureau of Prisons, Atlanta, Georgia) as:

> . . . persistent dysrhythmias between the left frontal area and the right frontal area with the right being faster and sharper than the left. The left shows abnormal persistent slow waves.
>
> Results of the dysrhythmias between the right posterior temporal runs and the left posterior runs with the left being faster and sharper than the right. The right shows persistent slow fade waves with some very sharp waves interspersed. [E.C.R. "B," Ex. C, Doc. II, 1].

The report set out the following conclusion:

> The EEG tracing suggests organic brain damage localized at the rpsent [sic] time to the left posterior frontal area and right posterior

temporal area. This is felt to be secondary to chronic glue and solvent sniffing and if continued I would expect it to become generalized. (Id.)

Petitioner's trial counsel was aware of this medical evidence of brain damage (Id. at Ex. A). He was also aware of a subsequent routine EEG performed in 1976 by the California state prison staff in San Luis Obispo which showed a "normal" EEG (Id.). He did not introduce evidence of the EEG suggesting brain damage in the penalty phase, nor did he mention it in cross-examination of Dr. Griswold, and he recalled no tactical or other reason for this inaction (Id.).

Following the conviction, petitioner's new counsel requested funding by the State to do confirmatory neurological testing for brain damage. The request was denied, although two Justices of the California Supreme Court (Bird, C.J. and Kaus, J.) believed the application for a neurological examination

should have been granted.

REASONS FOR ALLOWANCE OF THE WRIT

I. THE STATE'S USE OF A MENTAL DISORDER AS AN AGGRAVATING FACTOR WARRANTING A DEATH PENALTY VIOLATES THE FIFTH AND EIGHTH AMENDMENTS.

The State has conceded that petitioner's jury was free to use his medically-recognized mental disorder as an aggravating factor supportive of a death penalty (Respondent's Fifth Supplemental Brief to court below, p. 2). It was there argued that there was no error in such usage (**id.** at 2-3).

The State relied upon its expert's testimony on the mental disorder diagnoses to argue for a death penalty (RT 4703, 4716-17, 4728, 4732). The jury was instructed it could use petitioner's mental condition as an aggravating factor (RT 4792). The circuit court below finds nothing unconstitutional either with using this mental disorder as aggravating evidence or basing a verdict of

death on it. See Exhibit B.

It is unconstitutional to allow a medically-recognized mental disorder to serve as a reason to put someone to death. That over which one has no control[3] is not a reason to warrant a death penalty. A mental disorder is an involuntary condition and as such is a constitutionally-mandated mitigating factor. At a minimum, mental disorder cannot be argued by the State as a reason to impose a death penalty. In **Eddings v. Oklahoma** 455 U.S. 104 (1982), this Court reversed a death sentence because the sentencing court declined to consider mitigating evidence (including this very same mental disorder). See also, **e.g.**, the Supreme Court of Alabama opinion in **Willie**

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[3] While many researchers deem anti-social personality disorder as a developmental disorder brought on by environmental factors, there is a "biological substrate [which] must exist for the development of a psychopathic character disorder." Meloy, J. Reid, The Psychopathic Mind: Origins, Dynamics, and Treatment, p. 37 (1988 J. Aronson, Inc.). Whether caused by biological or environmental forces or both, a human being has no control over the mental disorder's onset and cannot be deemed less deserving of mercy because of it.

Clisby, Jr. v. State, 456 So.2d 99, 102 (1983), where the court stated:

> In **Eddings** [**v. Oklahoma** (1982) 455 U.S. 104], the court specifically found that evidence of "a difficult family history and of emotional disturbance" constitutes relevant mitigating evidence. In this case, as in **Eddings**, evidence was presented that the defendant had an antisocial personality. Here, the defendants mental or emotional disturbance **must** be considered as relevant mitigating evidence. (emphasis in original)

In **Zant v. Stephens**, 462 U.S. 862 (1983), this Court stated in **dictum** that a statute would violate the defendant's right to due process of law if a state:

> attached the 'aggravating' label to factors . . . that actually should militate in favor of a lesser penalty, such as perhaps the defendant's mental illness. Cf. **Miller v. Florida**, 373 So.2d 882, 885-886 (Fla. 1979). If the aggravating circumstances at issue in this case had been invalid for reason such as [this], due process of law would require that the jury's decision to impose death be set aside.

Zant's citation to **Miller v. Florida**,

supra, is particularly instructive because in that case the Supreme Court of Florida held that the trial judge's consideration at sentencing in a capital case of the defendant's incurable and dangerous mental illness as a non-statutory aggravating factor was improper.

Since the Middle Ages, "Anglo-American law has accepted special treatment, and often has permitted mitigation, when a criminal is afflicted with a mental abnormality." Liebman & Shepard, "Guiding Capital Sentencing Discretion Beyond the 'Boiler Plate': Mental Disorder as a Mitigating Factor" 66 **Georgetown L.J.** 757, 791 (1978). The evolution of the insanity defense and the diminished responsibility defenses to guilt evolved out of a belief that the mentally disordered should have mitigated punishment, particularly where death was a possibility.

Consistent with this fundamental

principle, most state death penalty statutes passed in the mid-1970's "explicitly listed mitigatory factors that must be considered by the sentencing authority, including some form of mental disorder." (**Id.** at 794). This is because the moral underpinnings of punishment (expatiation, retribution, responsibility and deterrence) justify mitigatory treatment of the mentally disordered (**Id.** at 817).

Zant v. Stephens, supra at 877, recognized the "fundamental requirement that each statutory aggravating circumstance must satisfy a constitutional standard derived from the principles of **Furman** [**v. Georgia**, 408 U.S. 238 (1972)] itself." The Court continued:

> To avoid this constitutional flaw, an aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of more severe sentence on the defendant compared to others found guilty of murder. (**Id.** at 877; emphasis added).

Permitting the jury to find aggravation

by relying on evidence of petitioner's mental disorder allowed factors to be used in favor of death which this Court in **Zant** said ". . . actually should militate in favor of a lesser penalty, such as perhaps the defendant's mental illness [citation]." (**Id.** at 885). **Eddings** earlier applied this rule by reversing a death sentence where the sentencer failed to evaluate this same mental disorder in mitigation of punishment.

Here, the State concedes and the court below holds that petitioner's jury was instructed that it could use mental disorder as an aggravating factor in determining penalty.

The opinion holds that the petitioner's mental disorder of Antisocial Personality Disorder is "not analogous to" the incurable and dangerous mental illness of paranoid schizophrenia (Ex. A., 8396; see also the court's medically unsupported reference to

"can't help it" mental disorders in Ex. B).

A mental disorder is something over which a defendant has no control and may very well be, in whole or in part, biological in origin (see footnote 3) Here, it was used to bring in a death sentence. This is medically, morally, and constitutionally wrong.[4] It is as constitutionally impermissible to kill a defendant based on a mental disorder as it is to kill him because he has a communicable disease. Due process and Eighth Amendment guarantees are offended by such a barbaric practice endorsed by the Ninth Circuit Court

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[4] Contrary to the opinion below, this Court in **Eddings, supra**, the Supreme Court of Alabama in **Clisby, supra**, and others have determined that the DSM III (1980 American Psychiatric Association) diagnosis of Anti-social Personality Disorder (sec. 301.70) is mitigating evidence, see e.g., Liebman & Shepard, "Guiding Capital Sentencing Discretion Beyond the 'Boiler Plate.'" Mental Disorder As a Mitigating Factor" 66 Geo.L.Jour. 757, 829-834; **Williams v. United States** (D.C. 1962) 312 F.2d 862, 865 (sociopathy evidence raises issue of defendant's insanity); **Royal Commission on Capital Punishment** (1949-1953), p. 139 ("the responsibility of psychopaths can properly be regarded as diminished, ...").

of Appeals and fully at work in California.[5]

II. THIS COURT'S DECISION IN McCLESKEY V. KEMP 481 U.S.__, 107 S.Ct. 1756 (1987), DOES NOT PROHIBIT A PETITIONER FROM HIS ENTITLEMENT TO NORMAL DISCOVERY IN DEVELOPING HIS FEDERAL HABEAS CLAIMS OF UNCONSTITUTIONAL RACE, GENDER AND AGE DISCRIMINATION AS THE CIRCUIT COURT IN THIS CASE ERRONEOUSLY HELD.

In upholding the action of the district court in denying petitioner's request for discovery and for an evidentiary hearing on

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[5] The issue raised is a recurring one. In Satterwhite v. Texas, 108 S.Ct. 1792, 1799 (1988), the Court reversed a Texas death penalty based upon the improperly admitted testimony of a Dr. Grigson who testified, like Dr. Griswold in petitioner's case, that Satterwhite was a sociopath who could not profit from rehabilitative efforts and was a future danger:

> Dr. Grigson [as in petitioner's case] was the State's final witness. His testimony stands out both because of his qualifications as a medical doctor specializing in psychiatry and because of the powerful content of his message. Dr. Grigson [as in petitioner's case] was the only licensed physician to take the stand. He informed the jury of his educational background and experience, which included teaching psychiatry for over 12 years. He stated unequivocally that, in his expert opinion, Satterwhite "will present a continuing threat to society by continuing acts of violence." He explained that Satterwhite has "a lack of conscience" and is "as severe a sociopath as you can be." . . . Dr. Grigson [as in petitioner's case] concluded his testimony on direct examination with perhaps his most devastating opinion of all: he told the jury that Satterwhite was beyond the reach of psychiatric rehabilitation.

his race, gender and age discrimination claims, the opinion misconstrues this Court's decision in **McCleskey v. Kemp**, 481 U.S.__, 107 S.Ct. 1756 (1987). There, the defendant asserted that the Georgia capital sentencing process was administered in a racially discriminatory manner in violation of the Eighth and Fourteenth Amendments to the United States Constitution. In support of this claim, he proffered a statistical study authored by Professor David C. Baldus and his associates that purported to show a disparity in the imposition of the death sentence in Georgia based on the race of the murder victim and, to a lesser extent, the race of the defendant. Apparently, no limitation was placed upon Professor Baldus in his quest for the data necessary to support his statistical analysis. In other words, the petitioner's normal discovery rights were respected. Further, petitioner McCleskey was accorded an

extensive evidentiary hearing on his claims. Only after the district court fully and carefully considered all of the evidence which McCleskey had to present in support of his position was his claim denied on the merits.

Ultimately, this Court in **McCleskey** found that decision by the district court to be correct, as the statistical evidence presented by Professor Baldus, which was the only evidence submitted by McCleskey, did not prove the existence of discrimination, but at most indicated "a discrepancy that appears to correlate with race." 107 S.Ct. at 1777. What **McCleskey** did not hold is that discrimination claims can never be proven in federal court. Nor did it hold that statistical analyses were always insufficient in and of themselves to prove discrimination in the imposition of the death penalty. Plainly and simply, **McCleskey** holds that in order to prove discrimination in the

imposition of the death penalty by statistical means alone a petitioner must come forward with evidence rising to the level of "exceptionally clear proof" before the court will infer that the capital decision-maker's discretion has been abused, and that this discretion veils purposeful discrimination. 107 S.Ct. at 1769.

In stark contrast to the situation presented to this Court in **McCleskey**, petitioner in the instant case was never accorded the **opportunity** to muster the "exceptionally clear proof" which the Court would accept. The Circuit opinion states, "general statistical studies of the kind offered here do not prove discrimination." Thus, "it is not necessary to conduct a full evidentiary hearing as to studies which do nothing more than show an unexplainable disparity." **Harris v. Pulley**, Ex. A. at 8376.

Not only is the above statement in error

because of its misreading of the role of statistics as set forth in **McCleskey, supra**, but it also assumes, without any basis, that petitioner here sought to prove his claims exclusively by means of statistical materials.

In his petition, petitioner specifically alleged that he was intentionally discriminated against by virtue of the race of his victim, his own gender, and his age [E.C.R. A: 6-9]. In an attempt to obtain discovery upon remand to the district court in order to strengthen the evidence which he intended to present in support of his discrimination claims, petitioner included the preliminary findings of Dr. James Cole -- based upon publicly available material -- that the gender of the defendant, the race of the victim, and the age of the defendant appeared to correlate impermissibly with the imposition of the death penalty. At no time did petitioner indicate, either in any of the

pleadings filed with the district court or in oral argument before the district court, that his statistical studies were as exhaustive and as complete as possible, or that he intended to rely exclusively upon statistical analyses at a hearing in order to prove his claim. Nevertheless, the district court, in its order denying petitioner's motions for discovery and for an evidentiary hearing ruled that, "even if Harris can prove his allegations of disproportionate application of the death penalty based upon the race, sex and age of the victim, he is nevertheless not entitled to the relief he seeks. For that reason, . . . the court denies Harris' request for an evidentiary hearing, his request to transfer to the California appellate court and his discovery motion." [E.C.R. L: 14]. This ruling of the district court, issued before the opinion of this Court in **McCleskey** is legally incorrect. **McCleskey**, as noted above,

does not hold that discriminatory imposition of the death penalty based upon the impermissible factors of race of victim and sex and age of the perpetrator is constitutional; it merely demanded "exceptionally clear proof" of such discrimination before a constitutional violation would be found. **McCleskey v. Kemp**, **supra** at 1769. **McKleskey** does not stand for the proposition that a petitioner may be summarily denied discovery of statistical proof to help make his claims.

Because of its erroneous interpretation of the law, the district court did not exercise its discretion in determining whether or not petitioner's discovery motion ought to have been granted under Rule 6(a), Rules Governing Section 2254 Cases, 28 U.S.C. foll. section 2254 (1982). On the contrary, it held that discovery was not necessary because in its view no amount of proof of discrimination,

no matter how strong, could possibly result in a favorable ruling for petitioner.[6]

In upholding this ruling of the district court, the opinion totally overlooks the fact that the statistics proffered by petitioner in support of his motion for further discovery[7] were preliminary in nature, and clearly not intended to constitute the end result of

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[6] In **Harris v. Pulley**, 692 F.2d 1189, 1197 (9th Cir. 1982), [hereinafter **Harris I**], the circuit stated in remanding the discrimination claims to the district court:

> We do not believe that the State accorded Harris a full and fair hearing on these constitutional claims. Although we do not decide whether Harris has a right to a hearing in federal court under **Pierce** [v.**Cardwell**, 572 F.,12d 1339, 1340-41 (9th Cir. 1978)], we believe that the district court should, if it becomes necessary, provide an opportunity to develop the factual basis and arguments concerning the race discrimination and gender discrimination claims. **Harris I**, supra at 1197. [emphasis supplied]

Upon remand, petitioner was denied discovery (despite a detailed preliminary showing of statistical proof) and a hearing by the district court. Ironically, even the State recommended to the district court in 1984 that such a hearing would be appropriate (RT 51).

[7] Petitioner sought discovery of the relevant material hoarded by the State of California in his detailed motion before the district court. See Petitioner's motion in E.C.R.D., excerpted in the opinion, Ex. A, 8375, footnote 5.

petitioner's efforts to muster evidence to support his claims of purposeful discrimination. The Court of Appeals then compares these preliminary data to the ultimate results submitted via the Baldus study on behalf of petitioner McCleskey, and based upon this comparison of "apples and oranges" concludes that petitioner's statistics are no more compelling that those rejected by this Court in **McCleskey**, resulting in a denial of relief.

Perhaps the most glaring example of the unfairness inherent in the opinion's approach is its discussion of the shortcomings of the preliminary statistics garnered by petitioner in support of his motion for further discovery regarding gender discrimination. In criticizing the data submitted in support of the request for discovery with respect to this issue, the opinion states, "these statistics fail to demonstrate if any of the ninety-four

women [convicted of murder but not sentenced to death] (1) committed crimes which permitted their execution, or (2) were eligible for the death sentence . . . These statistical flaws are fatal to Harris' claim." [Ex. A, at p. 8381]. This statement highlights the faulty logic inherent in the court's approach: it upholds the order of the district court denying discovery to prove a claim of gender discrimination by reference to the lack of presentation of data which the discovery motion was specifically designed to provide!

Of particular significance with respect to petitioner's gender discrimination claim is the fact that his preliminary statistics demonstrated that absolutely no women whatsoever had been sentenced to death for murder during the relevant time period (1977-1984) when scores of men had been so sentenced. This astonishing fact, standing alone, should have been sufficient to warrant

the granting of petitioner's discovery motion to further explore this anomaly. In the words of the Fifth Circuit in **Guice v. Fortenberry**, 661 F.2d 496, 505 (5th Cir. 1981), quoted with approval in **Morgan v. United States**, 696 F.2d 1239, 1241 (9th Cir. 1983), "statistics are not, of course, the whole answer, but nothing is as emphatic as zero."

Further, these statistics do not come in a vacuum. One need not be a sociologist to know that sexist tendencies exist in society by which sexual stereotypes and chivalrist notions of women as the "weaker" sex give rise to deferential and discriminatory treatment. From denial of the right to vote, to disqualification for jury service, to lack of equal pay at work and equal access to public clubs, these discriminatory tendencies are at work today. Discrimination does not stop at the courthouse door. Petitioner's showing entitled him to discovery and a hearing to

make out his claims.

The same mistaken analysis underlying the opinion's evaluation of petitioner's Fourteenth Amendment claims infects its consideration of his Eighth Amendment claim based upon discriminatory application of the death penalty. **McCleskey** did not hold, as the district court did, that an attack under the Eighth Amendment cruel and unusual punishment clause was totally precluded by **Pulley v. Harris**, 465 U.S. 37 (1984) [holding California's death penalty statute to be facially constitutional]. Rather, **McCleskey**, noting the "unceasing efforts to eradicate racial prejudice from our criminal justice system," (Id. at 1775), held that the Baldus study then before it did not demonstrate "an unacceptable risk of racial prejudice influencing capital sentencing decisions." (Id. at 1775.)

In analyzing petitioner's contentions in

light of **McCleskey**, the court below erroneously assumed that the initial data submitted in support of the discovery motion constituted a completed analysis rather than a mere introductory showing designed only to convince the district court that further data was necessary in order to complete and refine the evidence in support of this argument. The opinion then compares this preliminary data with the completed, refined product submitted on petitioner McCleskey's behalf and concludes that this data is insufficient to prove an Eighth Amendment constitutional violation. Here again, the opinion puts the cart before the horse. It upholds the denial of petitioner's discovery motion based upon reference to the preliminary data. The State held the bulk of the information requested by petitioner and refused to disgorge it; the district court refused to order the State to provide it and the circuit opinion affirms the

district court by assessing his initial showing as if it were all-encompassing. It is indefensible to deny petitioner access to this critical information in the possession of the State and then throw him out of court for not having it.

A petitioner must, in all fairness, be granted the opportunity to present his claims on the merits to prove his death penalty is the product of pervasive unconstitutional discrimination. **McCleskey** does not stand for the Circuit court's broad holding which, if sustained, will allow courts to deny the condemned even the bare opportunity to have access to the proof, held by the State, and necessary to make the constitutional claim.

III. CALIFORNIA UNCONSTITUTIONALLY PERMITS THE AGE OF THE DEFENDANT TO BE USED AS A REASON IMPOSE THE DEATH PENALTY.

The California Supreme Court has

exacerbated the constitutional defects of the State's death statute by arriving at an interpretation which specifically and unconstitutionally permits a defendant's chronological age to be argued by the prosecution as a factor in aggravation of penalty. See e.g., **People v. Lucky**, 45 Cal.3d 259, 301-302 (1988) ["mere chronological age of itself should not be deemed a mitigating factor"]; **People v. Babbitt**, 45 Cal.3d 660, 716 (1988); see also **People v. Coleman**, 48 Cal.3d 112, 153 (1989). **Lucky** squarely rejected petitioner's argument that "age can only be a mitigating factor" (**ibid.**), and held that the statutory penalty factor of "age" did not refer to chronological age, but rather functioned as a "metonym" for any "age related matter" which may properly be argued by either party in mitigation or in aggravation. (**Ibid.**)

Petitioner's jury was told it could

consider petitioner's "age at the time of the crime" as an aggravating or mitigating factor (RT 4791). This was pursuant to the State's statutory language (Penal Code section 190.3(h)). The use of age as an aggravating factor is unconstitutional under the Eighth Amendment, as well as a denial of due process.

The circuit court totally misconstrued petitioner's claim (see "Failure to Give Proper Instruction on Age Discrimination," Ex. A, 8365-66). The crux of this issue is not age discrimination (a claim raised separately **supra**, argument II). Rather the claim is that age may never be constitutionally wielded as a factor weighing in aggravation of penalty, whereas under the provisions of the California statute, age not only can be but also frequently is used as a factor in aggravation.

The opinion states variously that the issue involved was not procedurally exhausted on direct appeal or in post-conviction

proceedings in the California court system (Ex A., p. 8385); that the claim was not presented in either the first or second federal petition (**ibid.**), and then that the issue was in fact rejected on the merits by the state courts and also by itself in **Harris I** (Ex. A, p. 8389). These are internally inconsistent findings. Proper evaluation reveals that there was no procedural bar to review of the issue.[8]

Petitioner raised the age argument in **Harris I** by an attack only on the statute; in **Harris II** the argument was an "as applied" attack based on empirical reference to the accumulated capital sentencing experience under the statute. Petitioner argued at length based on accumulated instances of the

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[8] Even if the court below were correct in its exhaustion analysis, to require it now would be to require an exercise in futility. The California Supreme Court has ruled on this precise issue a number of times recently and has said that age may be used for any purpose. These recent decisions clearly rejecting the petitioner's claim make exhaustion futile and thus exhaustion is an improper basis to avoid substantive review (**Smith v. Blackburn**, 632 F.2d 1194, 1995 (5th Cir. 1980); **Layton v. Carson** (5th Cir. 1973) 479 F.2d 1275, 1276).

prosecutorial argument that a defendant's age should be considered as aggravation against him in the penalty decision, as well as on aggregate statistics showing a disproportionate and discriminatory frequency of death sentences against defendants whose ages fell between 25 and 34.[9] Thus, the opinion is fundamentally defective in failing to acknowledge that Harris's claim about the statutory defect regarding the role of age in the sentencing process has been raised and pursued from the very outset of this litigation. Initially, Harris could base his

[9] Harris had been simultaneously pursuing an Eighth and Fourteenth Amendment discrimination claim based on age, separate from the effect of the language of the statute. Harris I refused to consider this claim because it was supported only by conclusory allegations. At that time there had not been enough capital sentencings experience for petitioner to make anything other than conclusory allegations. On remand, however, he availed himself of the then accumulated body of information to make a very strong showing of age discrimination against defendants in the 25-34 year old group. Harris then incorporated this same body of information in support of his continuing argument that the sentencing statute was defective because age was permitted to, and in fact did, provide an unconstitutional aggravating function.

argument only on the statutory wording and accompanying instruction because he had no accumulated evidence or data to show in addition that the statute actually operated in an unconstitutional manner. Now, with the passage of time, petitioner has been able to show that the capital sentencing process as it actually operates is marred by the unconstitutional use of age as an aggravating factor. The opinion is thus fundamentally wrong in foreclosing petitioner from obtaining adjudication of this argument. He had raised the substantive argument squarely from the outset. In **Harris II**, with the passage of time, he has been able to strengthen the claim by demonstration of the actual application of this statute in the unconstitutional manner of which he complained from the outset.

In the meantime, the California Supreme Court has taken further steps to establish itself outside the pale of the federal

constitution as well as every other capital sentencing jurisdiction in the country with respect to the use of age as aggravation. In contrast to every other capital sentencing statute, which specifically enumerates age as a mitigating factor or as irrelevant to the sentencing proceeding, the California Supreme Court has issued an interpretation that it is entirely permissible and constitutionally proper for the prosecution to take advantage of the ambiguities of the sentencing statute and to argue that a defendant's age should be considered in aggravation at penalty.[10] This is wholly inconsistent with the clearly

[10] A further constitutional defect in the California Supreme Court's statutory interpretation of the age factor is its assertion that the term "age" does not mean "chronological age" in spite of its clear common usage to signify chronological age. Rather, the California Supreme Court views the term "age" as a "metonym for any age-related matters." (**People v. Lucky, supra.**) The statute as so construed is thus doubly ambiguous -- the term "age" is not even used in its common sense manner to refer to the petitioner's chronological age; rather, it is used to refer to unspecified congeries of "age-related matters," without guidance as to what these matters are. Moreover, no guidance is given as to whether these "age-related matters" should be viewed as aggravation or mitigation.

established constitutional principle of **Zant v. Stephens** (1983) 462 U.S. 862, that biological factors over which the defendant exercises no control, such as mental illness or age in this case, cannot weigh against him in aggravation of penalty. Rather, as held in **Zant** and argued by petitioner, evidence of such a factor or condition can be found to be mitigating or neutral. While the weight of its effect in mitigation is of course a matter to be determined by the trier of fact, the guiding statute may not permit the trier of fact to turn the potentially mitigating factors into aggravation. California must be required as a matter of constitutional mandate to limit a defendant's age at a penalty trial to its use as a potentially mitigating factor the weight of which will be decided by the trier of fact.

IV. CALIFORNIA UNCONSTITUTIONALLY PROHIBITED PETITIONER, AN INDIGENT, THE FUNDS FOR A NEUROLOGICAL EXAMINATION TO AID IN HIS POST-CONVICTION DEMONSTRATION OF LONG-EXISTING BRAIN DAMAGE IN ORDER FOR HIM TO MAKE HIS CLAIM OF INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL.

States are constitutionally required to "shoulder affirmative obligations" to ensure that indigent defendants are afforded meaningful opportunity to present post-conviction claims. **Bounds v. Smith**, 430 U.S. 817, 824 (1977).

Ake v. Oklahoma, 470 U.S. 68, 84 (1985), upholds the federal constitutional right of an indigent to state appointed psychological experts when the expert's opinion touches a significant factor at trial and/or a penalty hearing to rebut the State's psychological or psychiatric evidence:

> Without a psychiatrist's assistance, the defendant cannot offer a well-informed expert's opposing view, and thereby loses a significant opportunity to raise in the jurors' minds questions about the State's proof of an aggravating factor. In such a circumstance, where the consequence of error

is so great, the relevance of responsive psychiatric testimony so evident, and the burden on the State so slim, due process requires access to a psychiatric examination on relevant issues, to the testimony of the psychiatrist, and to assistance in preparation at the sentencing phase. (**Ibid.**)

Under **Lockett v. Ohio**, 438 U.S. 586 (1978), and **Eddings v. Oklahoma**, 455 U.S. 104 (1982), the death sentencing process must permit jury consideration of mitigation, such as mental defect or disorder, of the individual offender as well as the circumstances of the particular offense. This is a constitutionally indispensable part of the process of inflicting the penalty of death, **Woodson v. North Carolina**, 428 U.S. 280, 304 (1976), and necessary to avoid the unacceptable "risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty." **Lockett v. Ohio, supra**, 438 U.S. at 605.

A failure by trial counsel to develop and adduce relevant evidence of mitigating

circumstances produces an unconstitutional death sentence as surely as if the statute under which a person is condemned prohibited such mitigating evidence from being introduced.[11]

One of the ironies of petitioner's case is that state-appointed trial counsel did not use available evidence of brain damage (or further investigate the issue by conducting any Electro-Encephalogram [EEG] testing) to counter the State's penalty phase psychiatric expert who testified to the "aggravated" nature of petitioner's mental condition.[12]

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[11] See **State v. Sireci**, 536 So.2d 231 (1988), where the Florida Supreme Court upheld the reversal of a death penalty because the court appointed psychiatrists beofre trial did not test for organic brain disorder. Evidence of such damage as a result of a car accident which occurred ten years prior to trial was available. Here, there was cogent evidence available of organic brain damage, but the State refused to allow petitioner the means by which to conclusively prove it.

[12] Confirmatory evidence of organic brain damage would have provided a basis to explain and undermine the extremely prejudicial testimony of Dr. Griswold. Exploration of the issue might also have provided counsel with ammunition to attack Dr. Griswold's protestations of being a "neutral" expert instead of a "killer shrink" (RT 4635; see 692 F.2d 1203). See

When his successor counsel sought an authorization from the State of California to investigate this issue of petitioner's brain damage, they were rebuffed by the State courts. This attempt to investigate the issue would have aided petitioner in establishing his claim of ineffective assistance of counsel. Petitioner cannot be faulted for the State's unjustified denial of his access to that evidence.[13]

Montijo v. Secretary of Health and Human Services, 729 F.2d 599, 602 (9th Cir. 1984), where the United State Attorney's office for the Southern District of California represented to the Ninth Circuit that Dr. Griswold "regularly" provided manufactured diagnoses and "opinions out of whole cloth upon demand" to certain favorite attorneys.

[13] The opinion holds that trial counsel's failure at the penalty trial to introduce the evidence of brain damage (an EEG conducted in 1971) was not demonstrably incompetent (Ex. A., 8365-66). However, the opinion does not address petitioner's argument that counsel was ineffective for failure even to investigate the brain damage issue once he became aware of the 1971 test. The record is unrefuted that trial counsel did not explore the EEG issue prior to trial by having such a test conducted. The State conceded to the district court that if the competency of counsel issue were procedurally viable, then "we are going to need a hearing on competence of counsel" (RT 52). It is one thing to hold, as the opinion does, that the reason not to introduce the brain-damage EEG could have been tactical, but there could be no such tactic in failing to investigate (See **Kimmelman v. Morrison**, 477 U.S. 365 (1986)

The opinion questions, surprisingly, what light this evidence would have shed on petitioner's mental status at the time of the offense or at trial. The answer is plain. Organic brain damage does not go away. If it appeared in 1971, as an EEG conducted on petitioner so indicated, it would still exist in 1982. Discovery of this by investigation would be powerful evidence of trial counsel's ineffectiveness in not pursuing a similar investigation.[14]

The circuit's questioning of the utility of such an exam was answered long ago in **Brubaker v. Dickson**, 310 F.2d 30 (9th Cir. 1962), a case where the defendant was found

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(failure to seek discovery on search issue falls below standard of **Strickland v. Washington**, 466 U.S. 668 (1984).)

[14] The opinion relies on the existence of an EEG performed in 1976 by the State of California, while petitioner was in state prison, which indicated normal tracings. Thus, the opinion elects to find the State's 1976 EEG reliable and the previous federally conduct EEG irrelevant. All petitioner sought was an examination by a qualified neurologist to settle the issue.

guilty of first degree murder and sentenced to death. An EEG performed after conviction revealed organic brain damage. The appellate court held, in reversing the conviction, that the failure of trial counsel to present available evidence on the issue of petitioner's capacity to intend an act constituted ineffective assistance of counsel. The court recognized that material relating to organic brain damage is mitigating penalty information (Id. at 36, n. 31). Indeed, the EEG conducted after Brubaker's conviction convinced the Governor of California to issue a reprieve of the death sentence because it showed ". . . organic brain damage of a type often associated with abnormal and otherwise unexplainable conduct" (Id. at 33, n. 8).[15]

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[15] Ironically, petitioner was denied relief by the State courts despite the fact that the California Supreme Court, in In re Ketchel, 68 Cal.2d 397, 401-402 (1968), granted similar relief and recognized that a psychiatric examination post-conviction can aid appellate counsel in a variety of ways:

> Another possibility lies in the aid the psychiatric report might render counsel in determining

In **Penry v. Lynbaugh**, ___ U.S. ___, 109 S.Ct. 2934 (1989), the court held that juries must on request be given instructions allowing them to give effect to mitigating evidence such as mental retardation in determining the ultimate penalty. Here, petitioner attempted to demonstrate that his penalty jury never had the opportunity to even learn of powerful mitigating evidence (organic brain damage) because of the oversight of trial counsel.

The State's unjustified denial of an incarcerated, condemned and indigent prisoner of access to meaningful expert evidence to confirm pre-existing brain damage, a potent mitigating factor, was a gross denial of

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whether defendant had been adequately represented by trial counsel in the face of his failure to raise a valid defense, such as that of diminished capacity [citations]. The assistance of the informed psychiatrist could lead to the possible bases for collateral attack. It certainly could assist counsel in the development of overall strategy. The right to such aid should hardly be conditioned upon a showing of its precise application or utility.

federal due process of law.[16]

V. SATURATION OF THE TRIAL COMMUNITY WITH INFLAMATORY PRE-TRIAL PUBLICITY GENERATED BY FEDERAL AND STATE PROSECUTORS PUBLICLY VYING FOR THE FIRST OPPORTUNITY TO PROSECUTE PETITIONER, WARRANTS INVOCATION OF A PRESUMPTION THAT PETITIONER'S ABILITY TO OBTAIN A FAIR TRIAL WAS PREJUDICED.

The issue here is whether the presumption of prejudicial publicity is raised where the time between the crime and trial is short, the hostile publicity in the community is overwhelming and is fanned by media statements and leaks by prosecutors and the law enforcement agents. In petitioner's case, the hostility toward him invaded the very jury room from which his jury was selected as potential jurors talked about him in a manner demonstrating hostile pre-judgment.

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[16] The denial of the application also violated his Fourteenth Amendment right to due process under Hicks v. Oklahoma, 447 U.S. 343, 346 (1980), where it was held that if a state creates a substantial right for its citizens, the arbitrary denial of that right by the state is a federal due process violation even if the right itself is not federally guaranteed.

The Sixth Amendment to the United States Constitution guarantees a "trial, by an impartial jury . . . ." A trial in a fair tribunal is basic to the requirement of due process of law (**Irvin v. Dowd**, 366 U.S. 717, 722 (1961). There are instances in which pre-trial publicity may be so pervasive that even juror protestations of an ability to set aside their opinions of the case or what they have heard about it must be disregarded (**Irvin v. Dowd, supra** at 727). Indeed, in certain circumstances, the voir dire examination of the members of the jury will not even be examined such as where a filmed interrogation of a defendant is presented by the television media prior to the trial (**Rideau v. Louisiana**, 373 U.S. 723 (1963)).

In **Estes v. Texas**, 381 U.S. 532 (1965), the court eschewed an examination of the voir dire because of the televised coverage of pre-trial and trial proceedings. The Court found

such coverage involved "such a probability that prejudice will result that it is deemed inherently lacking in due process" (**Id.** at 542-543).

In **Sheppard v. Maxwell**, 384 U.S. 333 (1966), the Court admonished trial courts to take strong measures to ensure a defendant's fair trial rights (**Id.** at 362). The Court prescribed preventive measures available to trial judges which would include such steps as: restricting media access to the courtroom (**Id.** at 359), efforts to control the release of leads, information, and gossip to the press by police, witnesses and counsel for the parties (**Id.** at 359), continuing the case until publicity abates (**Id.** at 363), changing the venue to another county not so permeated with publicity (**Ibid.**), sequestration of the jury (**Ibid.**), ordering a new trial if the publicity infects trial proceedings during trial (**Ibid.**). Particularly singled out for

attention in **Sheppard** were "extra judicial statements by any lawyer, party, witness, or court official which divulged prejudicial matters, . . ." (**Id.** at 361).[17]

In Murphy v. Florida, 421 U.S. 794, 798-99 (1975), the court noted that a "presumption of prejudice" will be applied to extreme instances where publicity drowns a defendant's right to a fair trial, citing **Rideau v. Louisiana, supra**, 373 U.S. 723; **Estes v. Texas, supra**; and **Sheppard v. Maxwell, supra**, as examples.

The presumptive test should be applied where adverse pre-trial publicity to a defendant facing trial is generated and made more toxic by the contribution of grandstanding prosecutors, and where the

[17] In **Branzburg v. Hayes**, 408 U.S. 665 (1972), the Court reiterated the need by the courts to control the release of information by police and counsel (**Id.** at 685). Court evaluations of ". . . the impact of publicity take into account what other measures were used to mitigate the adverse effects of publicity." (**Nebraska Press Asso. v. Stuart**, 427 U.S. 539, 565 (1976)).

publicity has had demonstrable impact on the jury venire.

Courts examining claims of prejudice arising from pre-trial publicity have always made a factor for court inquiry whether that publicity is generated by acts of the prosecution.[18] Because of the great responsibilities of a prosecutor, where it is shown that he has significantly contributed to the onslaught of adverse pre-trial publicity,

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[18] In **Delaney v. United States**, 199 F.2d 107, 113-115 (1st Cir. 1952), the Court said that it is an important consideration whether the government was responsible for the publication of the objectionable material or if it emanated from independent sources. In **Silverthorne v. United States**, 400 F.2d 627, 633 (9th Cir. 1968), the court said "... federal courts have been sensitive to claims of prejudice arising from publicity when that publicity is created by acts of the Government." See also **United States v. Denno**, 313 F.2d 364, 373 (2nd Cir. 1963) ("The publicity partly sponsored by the prosecution, created opinions of guilt long before trial ...."). See also **Coleman v. Kemp**, 778 F.2d 1487, 1539 (11th Cir. 1985) (significantly, the community's ranking law enforcement officer made widely reported and outrageous statements . . ."); **State v. Bell**, 315 So.2d 307, 31 (Sup Ct. La. 1975) (prosecution-emanated publicity considered in reversing trial court's venue decision); **State v. Stiltner**, 491 P.2d 1043, 80 Wash.2d 47, 52 n. 1 (1971) (conviction reversed after "astonishing" fact that state released prejudicial material to news media); **People v. Martin**, 19 A.D.2d 804, 243 N.Y.S.2d 343, 344 (1963) (change of venue ordered after police sponsored televised media interrogation of defendants).

and that publicity has had impact on a defendant's trial rights, courts reviewing a conviction should apply the presumption of prejudice test in such cases.[19]

The record of publicity in this case demonstrates repeated acts by state and federal prosecutors and their agents in releasing inflammatory statements, each publicly vying to out-insure the other prosecutor that their jurisdiction would best guarantee petitioner's permanent isolation from society. See **People v. Harris** (1981) 28 Cal.3d at 965-84 (dissenting opinion).

The crimes in this case took place on July 5, 1978, and the case went to trial rapidly with voir dire commencing on November 30, just over four-and-one-half months after the crimes. During this relatively brief time

[19] The presumption is rebuttable as by the passage of great gaps of time between publicity and trial. **Patton v. Yount**, 467 U.S. 1025 (1984) (four years). **Patton** reiterates that the presumption standard is still viable in extreme cases.

between the crimes and the trial, there were three long surges of hostile, non-factual publicity: 1) the month of July; 2) the weeks in late July, August and September when the District Attorney and United States Attorney each held press conferences and bickered over why they should be to first prosecute the petitioner, and 3) just before trial and while voir dire took place.

The opinion below finds the publicity as not inflammatory enough to warrant a presumption of prejudice (Ex. A., 8352). The court finds it "largely factual in nature" (ibid.). The "factual" accounts repeatedly related such prejudicial and inadmissible materials as: 1) petitioner's manslaughter conviction -- while jury selection was in progress, three articles in the San Diego Union (San Diego's major daily) described petitioner's courtroom admission of the prior made so that "the admissions will be kept from

the Harris jury." 2) media revelations of admissions and confessions from the beginning of the coverage until the eve of trial; petitioner counted at least 14 examples of media coverage of the confessions, one of which was published in the **Los Angeles Times** (San Diego Edition) two weeks before jury selection commenced; 3) media character assassination including published reports that at age 11, petitioner allegedly had committed cruel acts on animals, his prior record, the filthy condition of his home in Sealy, California, and having to be led into court proceedings in chains, thus furthering the public image of him as a dangerous person even in court proceedings. Just prior to jury selection, the **Los Angeles Times** released information that, "according to informed sources [petitioner] was involved in a sexual assault on a jail inmate . . . ." Community newspapers ran editorials about the case and

local politicians got into the act by voicing their outrage. This in turn provoked letters to the editors of local papers. One of the more graphic demonstrations of editorial outrage at petitioner was expressed on July 17, 1978, when the **San Diego Union** ran its editorial cartoon picturing petitioner (representing "paroled murderers") as black human sewage polluting society's clear water. In the midst of this pre-trial media barrage, a local television station held a Roman circus-like "Telepulse" poll on whether death was the appropriate penalty for petitioner. The response was 690 to 70 favoring death.

Thus, prior to jury selection, petitioner had not only been convicted by the media and the prosecutors, but the community had also imposed sentence. This publicity was ". . . vicious, excessive,. . . [and] officially sponsored. . . . " (**Patton v. Yount**, 467 U.S.

1025, 104 S.Ct at 2887).[20]

San Diego's two major prosecutors, the U. S. Attorney and Assistant District Attorney, engaged in a long-running August through September highly public debate over which could more effectively disable petitioner (Ex. A., 8352-55).

The opinion below concludes all of the above did not generate an atmosphere of community hostility. Yet this is not only contradicted by the extensive exhibits introduced below, but overlooks the discussions which took place in the jury lounge during voir dire. Susan Jadovitz, when sitting in the lounge as petitioner's jury was being picked, heard prospective jurors talking about the case and did not like the terminology being used because their opinions

[20] The State Supreme Court divided on this issue 4 to 2 with the dissenters believing reversal was warranted (People v. Harris (1981) 28 Cal.3d 935, at 965-84).

were already formed: "They said he murdered two boys. And I got irate because I thought that's not what they're here for." (RT 1275).

The conversations involved "[n]ot just prospective jurors, there have been other jurors too, from other courts" (RT 1287).

The opinion below states the improper jury lounge discussions were not hostile and intense (Ex. A., 8358), yet the prospective juror who voluntarily reported them to the trial court did not so characterize them.

In this case, the swell of community hostility, significantly agitated by hostile prosecutorial releases,[21] was not turned back

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[21] As one reads the many voluminous exhibits of publicity in this case, mention is made of "informed sources" who provided information, for example, on petitioner's alleged sexual assault on a jail inmate while awaiting trial [E.C.R. "P," Ex. B, 14; Doc. 40]. Petitioner requested an evidentiary hearing to produce further evidence to determine whether the "informed sources" who revealed such damaging information pre-trial were prosecutors or their agents [E.C.R. P, p. 18; Doc. 40]. The state cannot escape its responsibility for encouraging prejudicial pre-trial publicity through the ruse of not-for-attribution leaks. The district court did not address the request in its denial of petitioner's claim.

at the courthouse door. It flowed right into the jury lounge. In a community where the influence of adverse news media coverage raised enormous hostility and invaded the courtroom itself, even those jurors have little or no knowledge about the facts of a case become aware of the intense community feeling, and would feel the pressure to bring in a verdict consistent with the perceived community will. This is one of the reasons why in presumed prejudice cases a search of the voir dire is not required (See cases cited in Ex. A, 8351). These are cases in which the ". . . influence of the news media, either in the community at large or in the courtroom itself, pervaded the proceedings" (**Murphy v. Florida**, 421 U.S. 794, 799). That is what happened in petitioner's case.

Given the prosecution's significant contribution to the hostile pre-trial publicity and its flow into the jury lounge

where petitioner's jury venire was located, the court below should have applied a presumption of prejudice standard and required the State to attempt to rebut it.

Once a defendant produces evidence of significant prosecution contributions to adverse and improper pre-trial publicity releases, it should not be the defendant who bears the extremely difficult task of tracing the effects of such misconduct from media communications, through the community at large, straight to the actual jurors who sit in judgment on him.[22] Such a legal standard

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[22] Jurors affected by such publicity will often feel they can be fair nonetheless. Here, at least 9 of petitioner's jury were exposed to the publicity and their statements of professed impartiality should be considered for what there were: ". . . the jurors were called upon to assess their own impartiality for the court's benefit." (**Silverthorne v. United States**, 400 F,2d 627, 638 (9th Cir. 1968)). The unreliability of juror protestations of impartiality in such cases arises from "the failties of human nature itself" (**Irvin v. Dowd**, 366 U.S. 717, 727-728 (1961)). As the First Circuit said in **Delaney v. United States**, 199 F.2d 107, 112-113 (1st Cir. 1952): "One cannot assume that the average juror is so endowed with a sense of detachment, so clear in his introspective perception of his own mental processes, that he may confidently exclude even the unconscious influence of his preconceptions as to

placing the burden on the wrongdoer protects the defendant's fair trial interests at stake and properly places the rebuttable burden of proof on the party responsible for the taint. This Court should better articulate that standard in this case.

CONCLUSION

Petitioner requests the Court grant his petition and review the significant and recurring constitutional issues raised.

11/10/89 Respectfully submitted,

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Attorneys for Petitioner Robert Alton Harris

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probable guilt, engendered by a pervasive pre-trial publicity."

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBERT ALTON HARRIS,
Petitioner,

v.

R. PULLEY, Warden OF THE CALIFORNIA STATE PRISON AT SAN QUENTIN, CALIFORNIA,
Respondent.

No. 84-6433

D.C. Nos. CR 82-0249-E and CR 82-1005-E

OPINION

Appeal from the United States District Court
for the Southern District of California
William B. Enright, District Judge, Presiding

Argued November 5, 1986—Pasadena, California
Submitted June 29, 1988

Filed July 8, 1988

Before: Arthur L. Alarcon, Melvin Brunetti and John T. Noonan, Jr., Circuit Judges.

Opinion by Judge Alarcon

EXHIBIT A

SUMMARY

Criminal Procedure/Constitutional Law

The court affirmed an order denying petitions for writs of habeas corpus and vacated a stay of execution holding that the two murder convictions and death sentence under California's 1977 capital sentencing law are constitutional.

Petitioner Robert Harris was convicted of two counts of murder and sentenced to death. Twice the U.S. Supreme Court denied certiorari concerning his writs of habeas corpus. The district court then denied the first federal petition without an evidentiary hearing. This court issued a stay of execution pending appeal of the denial of the first federal petition for habeas corpus. Harris then filed a second federal habeas corpus writ. In *Harris v. Pulley*, 692 F.2d 1189, this court affirmed as to some of the issues but vacated the district court's denial of the first federal petition because the California Supreme Court did not undertake proportionality review of Harris' sentence. The U.S. Supreme Court reversed and remanded, concluding that California's capital sentencing system is constitutional without a comparative proportionality review. Upon remand, the district court consolidated the unresolved issues contained in the first and second federal petitions. The district court denied the consolidated petitions for a writ of habeas corpus and issued a certificate of probable cause. On this appeal, Harris contends that the State violated his federal constitutional rights.

[1] Harris contends the pretrial publicity denied him a fair trial. He claims prejudice must be presumed because of the pervasive media coverage resulting from the public dispute between federal and state prosecutors over which office would be first to prosecute him. Alternatively, he argues that the responses given during the voir dire examination demonstrate actual prejudice. [2] Reviewing the record of publicity

does not reveal public passion warranting a presumption that the selected jurors for the trial were prejudiced. [3] Actual prejudice occurs when jurors show actual partiality or hostility that cannot be laid aside. [4] A key factor in gauging the reliability of juror assurances of impartiality is the percentage of veniremen who will admit to a disqualifying prejudice. [5] The Supreme Court has found that it is not unusual in a highly publicized case to excuse 20 persons from a pool of 78 because they had formed an opinion as to the defendant's guilt. [6] In this case, only 19 persons from a pool of 103 potential jurors were excused because they had formed an opinion as to Harris' guilt.

[7] Under Rule 9(a), a district court may dismiss a petition for a writ of habeas corpus, or separate grounds stated therein, upon a showing of three elements. [8] The three year delay in raising the claim of ineffective assistance of counsel prejudiced the State. [9] However, Harris' counsel acted with reasonable diligence. Thus, the district court did not abuse its discretion in denying the State's 9(a) claim. [10] Because it is possible that the failure to introduce Harris' abnormal EEG results was a tactical decision, this court must presume that counsel's conduct was competent.

[11] Harris contends that the "death-qualification" of the jury by removal for cause of the "*Witherspoon*-excludables" violated his rights under the sixth and fourteenth amendments. [12] The State contends the district court abused its discretion in denying its request to dismiss Harris' "death qualification" claim under 9(b). [13] The proper inquiry in determining whether a habeas petitioner has abused the writ by failing to raise a claim in a prior habeas petition is whether he withheld it without legal excuse. [14] Harris' claim that he had not exhausted state post conviction proceedings is without merit. [15] The U.S. Constitution does not prohibit the removal for cause of prospective jurors whose opposition to the death penalty is so strong that it would prevent or substantially impair the performance of their duties as jurors at

the sentencing phase of the trial. [16] The fair cross-section requirement does not apply to petit juries. [17] Even though death qualification in fact produces juries somewhat more conviction prone, the Constitution does not prohibit the States from death qualifying juries in capital cases.

[18] Harris contends the district court erred in denying his requests for discovery and an evidentiary hearing in order to prove his allegations that the California death penalty statute is applied discriminatorily against defendants convicted of murdering whites, and against males between 25 and 34 years of age. [19] The district court permitted Harris to submit updated statistical studies and declarations on his discrimination allegations. It was under no compulsion from this court to hold an evidentiary hearing. [20] An evidentiary hearing would be necessary to hear any evidence that a *particular* defendant was discriminated against. General statistical studies, however, do not prove discrimination. Moreover, it is not necessary to conduct a full evidentiary hearing as to studies which do nothing more than show an unexplainable disparity. [21] Harris has not demonstrated that the decisionmakers in this case acted with discriminatory purpose on the basis of the race of his two victims, his gender or age. His statistical evidence does not provide exceptionally clear proof that the jury in his case abused its discretion in recommending the sentence of death. [22] The court rejects Harris' contention that the California capital sentencing system is arbitrary and capricious in *application* in violation of the eighth amendment because racial, age and gender considerations may influence capital sentencing decisions in California.

[23] Harris also contends that the death sentence was arbitrarily imposed as a result of the uniquely ambiguous provisions of California's capital sentencing statute because the statute permits arbitrary consideration of a defendant's age as an aggravating factor. [24] The record does not support Harris' claims that the issue of instructional error concerning age

discrimination was clearly raised in the first federal habeas corpus petition.

[25] Under California's 1977 capital sentencing statute, a jury is given an instruction in the penalty phase of the trial which contains ten aggravating and mitigating factors it shall consider, take into account and be guided by in deciding whether to impose death or life imprisonment without the possibility of parole. [26] Harris contends the use of these nonstatutory factors violated his federal constitutional rights to due process and the prohibition against cruel and unusual punishment. The State asks that this court declines to review this issue under Rule 9(b). [27] There is no indication in the record that Harris' counsel made a conscious decision deliberately to withhold this contention, to proceed by piecemeal litigation, to vex or harass the court or State, or to delay the proceedings.

COUNSEL

Michael J. McCabe, Attorney at Law, and Charles M. Sevilla, Cleary and Sevilla, San Diego, California, for the petitioner.

John K. Van De Kamp, Attorney General of the State of California, John W. Carney, Supervising Deputy Attorney General, and Michael D. Wellington, Supervising Deputy Attorney General, San Diego, California, for the respondent.

Julius L. Chambers, James M. Nabrit, III, John Charles Boger, Deval L. Patrick, NAACP, and Anthony G. Amsterdam, New York University School of Law, NAACP, New York, New York; Michael G. Millman and Eric S. Multhaup, California Appellate Project, San Francisco, California, for the amicus curiae.

OPINION

ALARCON, Circuit Judge:

Robert Alton Harris (hereinafter Harris) appeals from the denial of his petitions for a writ of habeas corpus challenging the constitutionality of his convictions for two counts of murder and the sentence of death under California's 1977 capital sentencing law.[1]

PROCEDURAL HISTORY

On March 6, 1979, a California jury in a bifurcated trial convicted Harris of two counts of murder and sentenced him to death. On February 11, 1981, the California Supreme Court affirmed the convictions and the sentence of death on direct appeal. *People v. Harris*, 28 Cal. 3d 935, 623 P.2d 240, 171 Cal. Rptr. 679 (1981). On that same date, the California Supreme Court denied Harris' petition for a writ of habeas corpus which had been filed simultaneously with his automatic appeal. The United States Supreme Court denied certiorari. *Harris v. California*, 454 U.S. 882 (1981).

On November 24, 1981, the Superior Court for San Diego County denied Harris' second state petition for a writ of habeas corpus. The California Supreme Court denied review of the petition. On June 7, 1982, the United States Supreme Court denied certiorari. *Harris v. California*, 457 U.S. 1111 (1982).

On March 5, 1982, Harris filed a petition for a writ of

[1]Harris was sentenced under the 1977 California death penalty statute, 1 Cal. Stat. 1977, ch. 316, 1255-1266, which was codified at Cal. Penal Code Ann. §§ 190-190.6. The 1977 statute was replaced in late 1978 by the substantially similar provisions now in effect. *See* Cal. Penal Code Ann. §§ 190-190.7 (West Supp. 1987). Unless otherwise noted, references in this opinion are to the 1977 statute.

habeas corpus under 28 U.S.C. § 2254 in the United States District Court for the Southern District of California, No. CV 82-0249 (hereinafter first federal petition). On March 12, 1982, the district court denied the first federal petition without an evidentiary hearing. The district court refused to stay Harris' execution, but issued a certificate of probable cause. On March 12, 1982, we issued a stay of execution pending appeal of the denial of the first federal petition for habeas corpus. While the appeal was pending in this court, Harris filed a second petition for a writ of habeas corpus in the Superior Court for San Diego County on April 16, 1982, which was denied May 4, 1982. On June 30, 1982, the California Supreme Court refused to hear the petition. On August 13, 1982, Harris filed a second petition for a writ of habeas corpus pursuant to section 2254 in the district court, No. CV 82-1005 (hereinafter second federal petition).

In *Harris v. Pulley*, 692 F.2d 1189 (9th Cir. 1982) (per curiam) (hereinafter *Harris I*), we affirmed as to some of the issues but vacated the district court's denial of the first federal petition because the California Supreme Court did not undertake proportionality review of Harris' sentence. *Id.* at 1196-97. We also ordered that "the district court should, if necessary, request and examine all relevant parts of the state court record to determine whether the record supports the state court's findings" on the discrimination and pretrial publicity claims. *Id.* at 1200. As to Harris' discrimination claims, we stated that "if it becomes necessary, [the district court should] provide an opportunity to develop the factual basis and arguments concerning the race-discrimination and gender-discrimination claims." *Id.* at 1197.

The State filed a petition for certiorari presenting the question whether proportionality review is required by the United States Constitution. 460 U.S. 1036 (1983). The United States Supreme Court reversed and remanded, concluding that California's capital sentencing system is constitutional without a

comparative proportionality review. *Pulley v. Harris*, 465 U.S. 37 (1984).

Upon remand, the district court consolidated the unresolved issues contained in the first and second federal petitions. The issues we remanded to the district court raised in the first federal petition were the prejudicial effect of the pretrial publicity and the discrimination claims based on the race of the victim, and the gender and age of the defendant. In the second federal petition, Harris presented federal constitutional issues regarding (1) "death qualification" of the jury, (2) presentation to the jury of nonstatutory aggravating factors involving the defendant's "character, background, history, mental condition and physical condition," (3) ineffectiveness of counsel at the penalty phase, and (4) denial of due process for failure of the State to grant his post-conviction request for a neurological examination. The district court permitted each party to submit additional briefs and affidavits on the remaining issues. The district court denied the consolidated petitions for a writ of habeas corpus and issued a certificate of probable cause.

On this appeal, Harris contends that the State violated his federal constitutional rights in the following respects:

> 1. He was denied his right to a fair trial before an impartial jury, and the district court did not permit an evidentiary hearing on this issue, because of the pretrial publicity;
>
> 2. He was denied effective assistance of counsel at the penalty phase of his trial under the sixth amendment;
>
> 3. He was denied a post-conviction electroencephalogram (hereinafter EEG) examination to prove ineffectiveness of trial counsel in violation of

his due process rights under the fourteenth amendment;

4. He was denied his sixth amendment right to a fair and impartial jury because of the exclusion of jurors opposed to the death penalty;

5. He was denied his right to an evidentiary hearing on his equal protection claims that California's death penalty statute was applied discriminatorily based on the gender and age of the defendant, and race of the victims;

6. He was denied his right to due process because California's capital sentencing statute, Cal. Penal Code § 190.3(h) (1977), permits the arbitrary consideration of a defendant's age as an aggravating factor; and,

7. He was denied his rights under the eighth and fourteenth amendments because of the instructions given to the jury at the penalty phase of the trial.

We address each of these contentions and the facts pertinent thereto under separate headings.

DISCUSSION

I. PRETRIAL PUBLICITY

[1] Harris contends the pretrial publicity denied him a fair trial by an impartial jury in violation of the sixth amendment to the Constitution of the United States. Harris claims prejudice must be presumed in this matter because of the pervasive media coverage resulting from the public dispute between federal and state prosecutors over which office would be first to prosecute Harris. Alternatively, Harris argues that the responses given during the voir dire examination demon-

strate actual prejudice to his right to a fair trial before an impartial jury.

In *Harris I*, we described the nature and scope of the pretrial publicity in this matter as follows:

> Pervasive media coverage of Harris and his crimes started with his televised capture for bank robbery. The pretrial publicity apparently included stories that Harris and his brother had confessed to the crimes, that Harris had previously been convicted of manslaughter and that Harris had violated his parole. Numerous editorials and letters to the editor called for the death penalty and a television poll overwhelmingly showed that viewers supported the death penalty in this case. Even the battle between the U.S. Attorney's and District Attorney's offices concerning who would have the first opportunity to prosecute Harris received extensive coverage by the local media for over two weeks. *See People v. Harris*, 28 Cal. 3d at 965-69, 171 Cal. Rptr 679, 623 P.2d 240 (Bird, C. J., dissenting).

692 F.2d at 1199.

A. *Denial of Change of Venue*

Prior to jury selection, Harris made a motion for a change of venue pursuant to Cal. Penal Code Ann. § 1033(a) (West 1985) on the ground that there was a reasonable likelihood that because of extensive publicity, a fair and impartial trial could not be had in the County of San Diego. This pretrial motion was denied. Following voir dire examination of the jury, Harris renewed his motion for a change of venue. The trial court denied the second motion. The California Supreme Court denied Harris' petition for a writ of mandate to compel the trial court to grant a change of venue without opinion.

On direct appeal following Harris' conviction, the California Supreme Court reviewed the record and concluded that the state trial judge did not abuse his discretion in denying the motion for a change of venue. California's highest court reasoned that the size of the community dissipated the effect of the pretrial publicity and the voir dire testimony demonstrated no actual prejudice. *Harris*, 28 Cal. 3d at 949-50, 623 P.2d at 247, 171 Cal. Rptr. at 686.

After the California Supreme Court affirmed the judgment and denied his writ of habeas corpus, Harris filed his first federal petition for a writ of habeas corpus in which he claimed, inter alia, that he was denied a fair trial because of pervasive, prejudicial publicity. The district court denied the first federal petition. The record of the district court's proceedings did not reveal whether it had examined "all relevant parts of the state court record" on the question of the effect of pretrial publicity on his right to a fair and impartial jury. *Harris I*, 692 F.2d at 1199. In *Harris I*, we stated on remand that "the district court should, if necessary, request and examine all relevant parts of the state court record to determine whether the record supports the state court's findings." *Id.* at 1200.

On remand, the district court examined the state court record, including the exhibits presented at the motion for a change of venue and the reporter's transcript of the evidentiary hearing on the motion and the voir dire of the jury. The district court ruled (1) the publicity surrounding Harris' case did not warrant a presumption of prejudice and (2) the voir dire of the jury, viewed in light of the passage of time between the commission of the homicides and trial, demonstrated that Harris was not deprived of his right to a fair and impartial jury.

B. *Standard of Review*

"Our duty as a federal court sitting in habeas corpus is to make an independent review of the record to determine

whether there was such a degree of prejudice against the petitioner that a fair trial was impossible." *Bashor v. Risley*, 730 F.2d 1228, 1234 (9th Cir.), *cert. denied*, 469 U.S. 838 (1984) (citing *Irvin v. Dowd*, 366 U.S. 717, 723 (1961)). A reviewing court must independently examine the exhibits containing news reports about the case for volume, content, and timing to determine if they were prejudicial. *See, e.g., Patton v. Yount*, 467 U.S. 1025, 1035 (1984); *Murphy v. Florida*, 421 U.S. 794, 802-03 (1975); *Estes v. Texas*, 381 U.S. 532, 536 (1965); *Rideau v. Louisiana*, 373 U.S. 723, 724-25 (1963); *Irvin*, 366 U.S. at 725-26; *Bashor*, 730 F.2d at 1234-35; *United States v. McDonald*, 576 F.2d 1350, 1354 (9th Cir.), *cert. denied sub nom. Besbris v. United States*, 439 U.S. 927 (1978); *United States v. Green*, 554 F.2d 372, 376 (9th Cir. 1977); *United States v. Robinson*, 546 F.2d 309, 311 (9th Cir. 1976), *cert. denied sub nom. Chew v. United States*, 430 U.S. 918 (1977). "Determinations of juror bias are factual determinations to which the presumption of correctness under 28 U.S.C. § 2254(d) applies, although the constitutional standard of jury impartiality is a question of law." *Lincoln v. Sunn*, 807 F.2d 805, 814-15 (9th Cir. 1987) (citations omitted); *Austad v. Risley*, 761 F.2d 1348, 1354 (9th Cir.) (en banc), *cert. denied*, 474 U.S. 856 (1985).

C. *The Standards To Determine the Effect of Prejudicial Pretrial Publicity*

The standards governing a change of venue ultimately derive from the due process clause of the fourteenth amendment which safeguards a defendant's sixth amendment right to be tried by "a panel of impartial, 'indifferent' jurors." *Irvin*, 366 U.S. at 722; *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 551 (1976). The trial court may be unable to seat an impartial jury because of prejudicial pretrial publicity or an inflamed community atmosphere. In such a case, due process requires that the trial court grant defendant's motion for a change of venue. *Rideau*, 373 U.S. at 726. The prejudicial effect of per-

vasive publicity is tested under the presumed prejudice or the actual prejudice standards.

1. The Presumed Prejudice Standard

Prejudice is presumed when the record demonstrates that the community where the trial was held was saturated with prejudical and inflammatory media publicity about the crime. *Rideau*, 373 U.S. at 726-27; *Murphy*, 421 U.S. at 798-99; *see also Sheppard v. Maxwell*, 384 U.S. 333, 352-55 (1966). Under such circumstances, it is not necessary to demonstrate actual bias. *Estes*, 381 U.S. at 542-43; *Mayola v. Alabama*, 623 F.2d 992, 997 (5th Cir. 1980), *cert. denied*, 451 U.S. 913 (1981) (quoting *United States v. Capo*, 595 F.2d 1086, 1090 (5th Cir. 1979), *cert. denied sub nom. Lukefahr v. United States*, 444 U.S. 1012 (1980)). The presumed prejudice principle is rarely applicable, *Nebraska Press Ass'n*, 427 U.S. at 554, and is reserved for an "extreme situation." *Mayola*, 623 F.2d at 997.

In *Rideau*, the Supreme Court found the facts concerning the media publicity to be sufficiently extreme to invoke the presumed prejudice rule. Rideau confessed to robbing a bank in Calcasieu Parish, kidnapping three of the bank's employees, and killing one of them. 373 U.S. at 723-24. This confession was videotaped and subsequently broadcast three times by a local television station. *Id.* at 724. At the time, Calcasieu Parish had a population of 150,000. *Id.* At trial, the court denied defendant's motion for a change of venue. *Id.* The Supreme Court held that the denial of the motion to change venue violated the due process clause. *Id.* at 726. The Court noted that three jurors who decided the case had seen the televised confession. *Id.* at 725. The Court concluded "without pausing to examine a particularized transcript of the *voir dire* examination of the members of the jury" that due process required a trial before a community of persons who had not seen the televised confession. *Id.* at 727. The Court reasoned that the televised confession "*was* Rideau's trial," and "[a]ny

subsequent court proceedings in a community so pervasively exposed to such a spectacle could be but a hollow formality." *Id.* at 726 (emphasis in original).

[2] We have independently reviewed the 136 exhibits introduced at the state court hearing on the motion for a change of venue. These exhibits apparently include every media reference to the Harris matter from July 5, 1978, the date of the homicides, until November 30, 1978, the commencement of jury selection. The exhibits reveal that from July 5, 1978 to July 21, 1978, media interest in this case was at its zenith. We conclude that "the record of publicity in the months preceding, and at the time of, the . . . trial does not reveal the 'barrage of inflammatory publicity immediately prior to trial' amounting to a 'huge . . . wave of public passion' " to warrant a presumption that the jurors selected for the trial of this matter were prejudiced. *Patton*, 467 U.S. at 1032-33 (citations omitted).

The vast majority of the media accounts are largely factual in nature. *Compare Murphy*, 421 U.S. at 802 (pretrial publicity not prejudicial because the news articles concerning the defendant "were . . . largely factual in nature") *with Sheppard*, 384 U.S. at 338-49 (prejudicial media reports were not factual in nature). It is quite true that some of the media reports refer to Harris' prior criminal record, and the alleged confession of each brother. These accounts, however, were published within the two weeks immediately following the homicides. The number of news reports regarding the Harris case had dissipated considerably by the time of jury selection four months later.

Harris also claims "the record of publicity in this case demonstrates repeated acts by state and federal prosecutors releasing inflammatory statements, each publicly vying to outinsure [sic] the other that their jurisdiction would best guarantee appellant's permanent isolation from society." Harris argues that the release of publicity by law enforcement

demonstrates the atmosphere surrounding the trial was so inflammatory as to undermine his right to a fair trial. The record does not support this contention.

Former California Supreme Court Chief Justice Rose Elizabeth Bird, in her dissent in *People v. Harris*, described the public disagreement that occurred between the offices of the United States Attorney and the county district attorney as follows:

> About this time, the publicity surrounding this case in San Diego County developed a new aspect, as the two major prosecutorial officers in the county became engaged in a sharp public dispute over which office would "get first crack" at prosecuting appellant. The local United States Attorney's office was responsible for the prosecution of the bank robbery offense, and the county district attorney for the homicides. Each office issued statements indicating what sentence appellant would likely obtain if convicted in its respective court. The United States Attorney claimed that the federal charges were an "insurance policy" against appellant's early release by the parole board. After the district attorney's office responded that it was seeking the death penalty — a punishment not available in the federal courts for bank robbery — the United States Attorney held a televised news conference at which he expressed the opinion that the California death penalty law was unconstitutional.
>
> The district attorney's office took the public position that if the federal charges were tried first, the state might lose the opportunity to try appellant and obtain a death sentence. The district attorney attempted to delay appellant's arraignment in federal court, and members of the office accused the United States Attorney of "political grandstanding."

The United States Attorney responded that it was the county prosecutors who were "grandstanding."

When the federal authorities obtained a trial date of October 3, the *Tribune* noted this "tightens the race between the two jurisdictions as to which will be the first to try the case." An assistant district attorney described the "competition" between his office and the federal prosecutors as an "awkward situation." On August 7, the district attorney was able to have the state trial set on a date earlier than October 3, and the press reported that the district attorney had "moved ahead" in his efforts to "beat federal authorities to the punch in prosecuting the Harris brothers."

Attorneys in the district attorney's office privately told the press that the motivation of the United States Attorney was "politics." They claimed "he is politically ambitious and . . . he knows the case will receive a lot of publicity . . . ." The United States Attorney responded that he was merely seeking "maximum protection of the community." Members of the district attorney's office were said to "scoff" at this justification.

On August 10, the *Union* published a lengthy article on the jurisdictional dispute, reporting that a senior federal parole officer "disputed" the United States Attorney's computation of appellant's federal sentence. This official, who calculated a prison term "far under" the term mentioned by the United States Attorney, "cannot understand why [the United States Attorney] is insisting on prosecuting the two brothers from Visalia." County prosecutors were again said to claim that federal involvement was "for the sake of publicity." An assistant legal counsel for the C.R.B. computed for the *Union* that "the

> least" appellant would serve in state prison would be a term of years well beyond the term calculated by the federal parole officer.
>
> These events were duly reported by the *Union*, the *Times*, the *Evening Tribune*, and by the local television stations over a two and one-half week period from July 20th through August 10th, and beyond.

28 Cal. 3d at 969-71, 623 P.2d at 259-60, 171 Cal. Rptr. at 698-99.

These facts do not reveal a "general atmosphere in the community or courtroom [which] is sufficiently inflammatory" to deny Harris a fair trial by impartial jurors. *Murphy*, 421 U.S. at 802. The dispute between the two prosecutorial branches focused on the merits of each criminal system in the context of this particular case; the publicized dispute did not involve a prejudgment by either office as to the guilt of Harris which existed in *Silverthorne v. United States*, 400 F.2d 627 (9th Cir. 1968), relied upon by Harris. Similarly, the disagreement was relatively short-lived, only spanning a brief two and one-half week period in the early part of the four-month period between the homicides and the voir dire of the jury. Under the "totality of circumstances," *Murphy*, 421 U.S. at 799; *Patton*, 467 U.S. at 1031, the public dispute between the federal and local prosecution does not warrant a finding of community prejudice sufficiently inflammatory to deny Harris a fair trial.

2. Actual Prejudice

[3] To determine whether actual prejudice existed to deny defendant his right to "a panel of impartial, 'indifferent' jurors," *Irvin*, 366 U.S. at 722, a court must determine if the jurors demonstrated actual partiality or hostility that could not be laid aside. *Murphy*, 421 U.S. at 800. "[J]urors need not, however, be totally ignorant of the facts and issues

involved." *Id.* The Court in *Irvin* defined the constitutional level of impartiality required to ensure a fair trial:

> To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.

366 U.S. at 723.

[4] Harris claims the responses of the jurors on voir dire revealed actual prejudice because 79% (81 of 103) of the prospective jurors questioned and 75% (9 of 12) of the petit jury were exposed to pretrial publicity. We disagree. Actual prejudice is not demonstrated by a showing of exposure to pretrial publicity. "The relevant question is not whether the community remembered the case, but whether the jurors . . . had such fixed opinions that they could not judge impartially the guilt of the defendant." *Patton*, 467 U.S. at 1035 (citing *Irvin*, 366 U.S. at 723). The Supreme Court has indicated that a key factor in gauging the reliability of juror assurances of impartiality is the percentage of veniremen who "will admit to a disqualifying prejudice." *Murphy*, 421 U.S. at 803. The higher the percentage of veniremen admitting to a previously formed opinion on the case, the greater the concern over the reliability of the voir dire responses from the remaining potential jurors. *Id.*

[5] In *Murphy*, the Supreme Court found that it was not unusual in a highly publicized case to excuse 20 persons from a pool of 78 because they had formed an opinion as to the defendant's guilt. *Id.* at 803. Thus, no inference of actual prejudice could be drawn regarding the reliability of assurances of impartiality obtained from the remaining jurors. *Id.*

[6] In the instant case, the voir dire examination was conducted by the trial judge and counsel for both parties. It was very thorough and probing into any potential bias exhibited against Harris or knowledge about the case. Any juror who revealed exposure to prejudicial publicity was excused from the case by the court even without a showing that he had formed an opinion as to Harris' guilt. Only 19 persons from a pool of 103 potential jurors were excused because they had formed an opinion as to Harris' guilt. This constitutes an even lower percentage (18%) than was found acceptable in *Murphy* (26%). By contrast, in *Irvin*, where the reliability of juror assurances of impartiality was successfully challenged, almost 90% of the veniremen (370 of 430) entertained some opinion as to the defendant's guilt, including 8 of the 12 jurors finally placed in the jury box. 366 U.S. at 727.

The responses given by the jurors who were sworn to try this matter demonstrate their impartiality.[2] Three jurors had virtually no information about the case. None of the seated jurors indicated they held any preconceived notions regarding Harris' guilt. No actual prejudice to Harris' right to a fair and impartial jury is demonstrated in the voir dire examination.

D. *Discussions In Jury Lounge*

Harris claims that "hostile" and "intense" discussions in the jury lounge demonstrate actual or presumed prejudice and an impartial jury. While the individual voir dire examination was being conducted in the courtroom, prospective jurors waiting to be interviewed remained in the Jury Commissioner's Office. In the same room were persons summoned as prospective jurors in other criminal and civil matters.

[2]The voir dire in this case was extensive. It took 13 days to pick 16 jurors from 104 venire persons. *See Patton*, 467 U.S. at 1034 n.10 (it took 10 days to pick 14 jurors from 292 venire persons); *Irvin*, 366 U.S. 717 (it took 8 days to pick 14 jurors from 430 venire persons).

The trial judge admonished all the jurors in this matter not to discuss the case with anyone. On the eighth day of jury voir dire, after 64 jurors had been examined, a juror stated during voir dire that prospective jurors and jurors not involved in the Harris matter were discussing this case. After examining the juror further, the trial judge observed that "all [64] jurors who have been questioned have been frank and honest and we have been getting the benefit of what they really know." Harris' counsel concurred in the court's assessment. Pursuant to Harris' counsel's suggestion, the court admonished the remaining 18 jurors to avoid any discussions in the jury lounge concerning the case.[3] This special cautionary instruction and the extensive and searching voir dire examination of the jury conducted by the court and counsel eliminated any potential for prejudice arising from the jury lounge discussions about the case.

Harris' characterization of the jury lounge discussions as "hostile" and "intense" is not supported by the record. Only two of the jurors who served on the petit jury overheard the discussions in the jury lounge. Juror LaValley walked away when he heard a prospective juror mention the Harris trial. Juror Earl only heard that Harris was accused of murder.

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[3]THE COURT: Ladies and gentlemen, I have called you in because we know that the facilities down in the jury room are not too good. I am talking about the Jury Commissioner's office.

There is too much possibility of discussion on the part of those who are not involved in this case concerning this case, and I would ask that you please be very careful in your discussions with anybody, as I have told you during all of these admonitions, and to certainly avoid any discussion that comes from someone who is not involved. I am talking about jurors who are down there for other cases and who might volunteer information to you and so on.

If any incident does occur in which you are involved in conversation, someone is to involve you about this case, I want you to be sure and call it to the attention of the Court.

Now, we are going to go forward with our voir dire.

Harris' trial counsel thoroughly examined both jurors. The jurors' responses did not disclose any bias against Harris. These prospective jurors not selected to serve in this matter who overheard the lounge discussions did not express any hostility or bias toward Harris.

The state trial judge concluded that the responses to the voir dire examination did not demonstrate that there was a reasonable likelihood that the jurors selected to sit on the petit jury could not provide Harris with a fair and impartial determination of the facts. The judge expressed his assessment of this issue in the following language:

> I was impressed with the forthrightness of the jurors. I think the fact that they were interviewed individually and questioned individually even increases the desire on the part of the juror to tell us precisely what their feelings were .... I saw nothing ... in the examination to indicate to me that the jury or in any sense there was a feeling of hostility, that there was antagonism, that there was a knowledge so great as to create an atmosphere that would not allow for a fair trial. As a matter of fact, I think the reverse is true. I am satisfied that the jury that has been selected was very fairly selected.

A state trial court's findings of fact with respect to the prejudicial effect of pretrial publicity are presumed to be correct, 28 U.S.C. § 2254(d); *Chaney v. Lewis*, 801 F.2d 1191, 1194 (9th Cir. 1986), *cert. denied*, 107 S. Ct. 1911 (1987); *Austad*, 761 F.2d at 1354, and will not be set aside unless the error is manifest. *Irvin*, 366 U.S. at 724; *Patton*, 467 U.S. at 1031-32 & n.7 (applying the "manifest error" standard of *Irvin*). Our independent review of the record amply supports the state trial court's findings that the persons selected as petit jurors were not prejudiced against Harris as the result of the media publicity in this matter. Thus, Harris was not deprived of his right to an impartial jury.

II. EFFECTIVE ASSISTANCE OF COUNSEL AT THE PENALTY PHASE

Harris contends he was denied effective assistance of counsel at the penalty phase of his trial because his trial counsel failed (1) to present the abnormal results of his 1971 EEG examination as mitigating evidence and (2) to request a third EEG examination. The State contends that we should not reach the merits of Harris' ineffectiveness of counsel claim under Rule 9 of the Rules Governing Section 2254 Cases, 28 U.S.C. foll. § 2254 (1982). We first address the State's Rule 9 claims.

A. *Rule 9(a)*

In the district court, the State claimed the court should dismiss Harris' ineffective assistance of counsel claim under Rule 9(a) because it was prejudiced by Harris' four-year delay in asserting this claim. The State claims it was prejudiced by Harris' delay in raising the issue of ineffective assistance of counsel because "in the four years between Harris' conviction and the 'discovery' by present counsel of this issue, the principal witness (trial counsel) has become unable to remember whether he considered introducing such evidence at the penalty phase." Harris' trial counsel, Thomas J. Ryan, stated in his declaration in support of this contention of ineffectiveness of counsel, "I did not introduce the abnormal EEG as evidence at the penalty trial. I do not recall that I considered doing so." Because the district court reached the merits of the ineffectiveness of counsel claim and did not address the State's Rule 9(a) claim, we can only conclude that the district court impliedly rejected the State's claim of prejudice.

[7] Rule 9(a) provides:

> A petition may be dismissed if it appears that the state of which the respondent is an officer has been prejudiced in its ability to respond to the petition by

> delay in its filing unless the petitioner shows that it is based on grounds of which he could not have had knowledge by the exercise of reasonable diligence before the circumstances prejudicial to the state occurred.

Under Rule 9(a), a district court may dismiss a petition for a writ of habeas corpus, or separate grounds stated therein, upon a showing that (1) the state has been prejudiced in its ability to respond to the petition, (2) this prejudice resulted from petitioner's delay, and (3) the petitioner has not acted with reasonable diligence as a matter of law. *Brown v. Maggio*, 730 F.2d 293, 295 (5th Cir. 1984) (per curiam). The burden of proof initially lies with the state:

> If the State makes a prima facie showing that it has been prejudiced as a result of the petitioner's delay, the burden shifts to the petitioner to show either that the state actually is not prejudiced or that petitioner's delay "is based on grounds of which he could not have had knowledge by the exercise of reasonable diligence before the circumstances prejudicial to the state occurred."

McDonnell v. Estelle, 666 F.2d 246, 251 (5th Cir. 1982) (quoting Rule 9(a)); *Brown*, 730 F.2d at 295.

The state is prejudiced if the delay forecloses its ability to rebut the petitioner's allegations. Rule 9(a); *Brown*, 730 F.2d at 295. " ' "[D]elay alone is no bar to federal habeas relief . . . ." ' In order to prevail on a laches claim respondent must make a particularized showing of prejudice" caused by the delay. *Paprskar v. Estelle*, 612 F.2d 1003, 1007-08 (5th Cir.) (citations omitted) (quoting *United States ex rel. Barksdale v. Blackburn*, 610 F.2d 253, 260 (5th Cir. 1980), *cert. denied*, 454 U.S. 1056, (1981)), *cert. denied*, 449 U.S. 885 (1980)); *McDonnell*, 666 F.2d at 251; Rule 9(a). The ultimate disposition of whether the petitioner used reasonable diligence is

"based upon the reasonableness of the party's behavior under the circumstances." *Baxter v. Estelle*, 614 F.2d 1030, 1034 (5th Cir. 1980), *cert. denied*, 449 U.S. 1085 (1981).

[8] The State has made a sufficient showing that it has been prejudiced in its ability to respond to the petition because of Harris' delay in asserting the claim. Courts have found prejudice under Rule 9(a) where a delay in bringing a claim is accompanied by the inability of a witness to recall information necessary for the state to respond to the merits of the petition. *See, e.g., Mayola v. Alabama*, 623 F.2d 992, 999 (5th Cir. Unit A 1980) (prejudice found where there was "impairment of the recollections of numerous witnesses"), *cert. denied*, 451 U.S. 913 (1981); *Bouchillon v. Estelle*, 628 F.2d 926, 929 (5th Cir. Unit A 1980) (prejudice found where "at least two of the witnesses no longer had an independent recollection of the facts of the trial"); *Brown*, 730 F.2d at 295 (prejudice found where judge and defense attorney did not remember petitioner's plea); *Arnold v. Marshall*, 657 F.2d 83, 84 (6th Cir. 1981) (per curiam) (prejudice found where defense counsel could not remember specifics of the issue, witness had little recollection of the facts, two of the arresting officers had no recall of the case, and prosecutor had general recollection but no recall of specifics), *cert. denied*, 455 U.S. 922 (1982); *Moore v. Smith*, 694 F.2d 115, 118 (6th Cir. 1982) (prejudice found where defense counsel had no recollection why direct appeal was not taken), *cert. denied*, 460 U.S. 1044 (1983); *Cotton v. Mabry*, 674 F.2d 701, 705 (8th Cir.) (prejudice found where police, witnesses, and defense counsel had no recollection of trial), *cert. denied*, 459 U.S. 1015 (1982); *Bowen v. Murphy*, 698 F.2d 381, 383 (10th Cir. 1983) (per curiam) (prejudice found where recollections of judge and prosecutor were very limited). It may be assumed that Ryan would have had a better chance of remembering had this issue been raised earlier. *Brown*, 730 F.2d at 296. The three year delay in raising the claim of ineffective assistance of counsel prejudiced the State.

The next inquiry under Rule 9(a) is whether Harris can demonstrate that he acted with diligence as a matter of law. The State claims that both Harris and his current counsel were not reasonably diligent in proffering this claim. The evidence supports a contrary conclusion.

In April 1982, Michael J. McCabe, Harris' current counsel, stated in his declaration as to the discovery of the facts surrounding the ineffectiveness of counsel claim:

> 2. Within the past three months, I received a phone call from federal probation officer, Steven Blake, informing me that upon review of his probation file he discovered an electroencephalogram report from Springfield, Missouri. The report reflected that Mr. Harris suffered from organic brain damage, possibly due to chronic glue-sniffing.
>
> 3. This was the first time I had been informed of this report. I fully reviewed the court record of the trial proceedings and found no reference to an abnormal EEG test. Although I had numerous conferences with trial counsel, Thomas Ryan, between 1979 and 1982, the abnormal EEG was never raised.

On April 16, 1982, Harris filed his second writ of habeas corpus in the Superior Court for San Diego County raising this claim. In August 1982, after exhausting this claim in state court, Harris filed his second federal petition containing this contention.

[9] Our review of the record reveals that there is nothing in the trial record that would have alerted McCabe or put him on notice of the abnormal EEG report to permit him to include this claim at an earlier date. Thus, the record supports the district court's implied finding that Harris' counsel acted with reasonable diligence. The district court did not abuse its discretion in denying the State's 9(a) claim as to this issue.

B. *Rule 9(b)*

The State next claims that Harris' failure to assert the ineffective assistance of counsel claim in his first petition is an abuse of the writ under Rule 9(b) of the Rules Governing Section 2254 cases, 28 U.S.C. foll. § 2254. Rule 9(b) provides in pertinent part: "A second or successive petition may be dismissed if . . . new and different grounds are alleged, [and] the judge finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ."

The State argues for the first time on appeal that even if McCabe did not discover the factual underpinnings of the ineffectiveness of counsel claim in time to include it in Harris' first federal petition, the filing of a second federal petition was an abuse of the writ because Harris was aware of the facts upon which the new issues are premised. We do not reach this question because the State did not present this argument to the district court for consideration.

C. *Ineffective Assistance Of Counsel*

Harris claims his trial counsel's failure to present evidence at the penalty phase of his trial of the 1971 abnormal EEG examination results, and to request an EEG examination at trial constitute ineffective assistance of counsel. The facts do not support this conclusion.

In *Strickland v. Washington*, 466 U.S. 668 (1984), the Supreme Court set forth the test under which we review claims of ineffective assistance of counsel in capital cases. A petitioner must show both that counsel's performance "fell below an objective standard of reasonableness" considering "all the circumstances," *id.* at 688, and that "there is a reasonable probability that, absent the errors, the sentencer—including an appellate court, to the extent it independently reweighs the evidence—would have concluded that the balance of aggravating and mitigating circum-

stances did not warrant death." *id.* at 695. The Court noted that

> [b]ecause of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy."

Id. at 689 (quoting *Michel v. Louisiana*, 350 U.S. 91, 101 (1955)). Thus, "[j]udicial scrutiny of counsel's performance must be highly deferential." *Strickland*, 466 U.S. at 689. "Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim." *Id.* at 700. The district court applied the *Strickland* standard and concluded Harris had not demonstrated deficient performance by trial counsel or prejudice.

Harris' trial counsel was aware of the abnormal 1971 EEG showing abnormal results at the *guilt* phase of Harris' trial. He was also aware of a subsequent EEG performed in 1977, only two years before the homicides, which demonstrated *normal* results. Harris' counsel explained that he decided not to use the 1971 EEG results during the guilt phase of Harris' trial because it would have been inconsistent with Harris' alibi defense. He also states that "I did not introduce the abnormal EEG as evidence at the penalty trial. I do not recall that I considered doing so."

[10] These declarations do not overcome the "strong presumption" that Harris' counsel's failure to introduce the 1971 EEG results or to request a third EEG examination fell within "the wide range of reasonable professional assistance . . . ." *Strickland*, 466 U.S. at 689. We do not know from this record whether trial counsel concluded that the fact that the most recent EEG was normal might have been harm-

ful to a claim of mitigation based on mental impairment. Because it is possible that the failure to introduce the abnormal EEG results was a difficult but thoughtful tactical decision, we must presume that counsel's conduct was within the range of competency. Because Harris has failed to demonstrate deficient performance, the ineffective assistance of counsel claim must fail.

III. DENIAL OF A POST-CONVICTION EEG EXAMINATION

Harris contends the State of California's denial of his request for a post-conviction EEG examination was arbitrary and violated his right to due process under the fourteenth amendment. Because the State's action did not affect Harris' right to due process at his trial and sentencing, we must reject this argument.

In Harris' June 1982 "Application for Order Permitting a Neurological Examination of Petitioner at San Quentin, etc." filed in the California Supreme Court, Harris' counsel applied for an order permitting an EEG examination of petitioner "to enable petitioner to gather evidence to support his claim of ineffective assistance of trial counsel for failure to move for a pretrial neurological examination to confirm petitioner's organic brain damage." The state supreme court denied the request.

The record does not demonstrate that an EEG examination performed in 1982 would establish Harris' mental condition at the time of trial in 1979, or that it would aid a reviewing court in evaluating whether trial counsel's performance fell below an objective standard of reasonableness. *See Strickland,* 466 U.S. at 689. Thus, the California Supreme Court's decision to deny Harris' request for a post-conviction EEG examination was not arbitrary or violative of due process.

IV. "DEATH QUALIFICATION" OF THE JURY

[11] The state trial judge removed for cause, over Harris' objections, prospective jurors who stated that they could not under any circumstances vote for the imposition of the death penalty pursuant to *Witherspoon v. Illinois*, 391 U.S. 510 (1968). Harris contends that the "death-qualification" of the jury by removal for cause of the "*Witherspoon*-excludables" violated his rights under the sixth and fourteenth amendments to the United States Constitution because (1) the resulting jury is prone to convict, (2) it does not constitute a neutral or reliable tribunal, and (3) it does not represent a fair cross-section of the community. The district court rejected this claim and denied Harris an evidentiary hearing on this issue.[4] We initially address the State's assertion that Harris abused the writ under Rule 9(b).

A. *Abuse of the Writ*

[12] The State contends the district court abused its discretion in denying its request to dismiss Harris' "death qualification" claim under Rule 9(b) because (1) this argument was raised and rejected in his first federal petition, and (2) assuming this argument is new, there is no reason for it not to have been presented in the first petition. Rule 9(b) bars successive petitions where new grounds are alleged and the court

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[4]After Harris filed a notice of appeal to challenge this ruling, he moved this court on November 12, 1985, to recalendar oral argument in this case pending the decision of the Supreme Court in *Lockhart v. McCree*. *Lockhart* involved the issue of the "death qualification" of a jury. On January 16, 1986, this court vacated the setting of oral argument pending the Supreme Court's decision in *Lockhart v. McCree*. On May 5, 1986, the Supreme Court decided *Lockhart v. McCree*, 476 U.S. 162 (1986). Harris' case was recalendared for oral argument to November 5, 1986.

Both parties have filed supplemental briefs addressing the applicability of *Lockhart*. The NAACP Defense and Educational Fund, Inc. filed an *amicus curiae* brief devoted solely to the "death qualification" issue in support of Harris' contentions.

finds that failure to assert these arguments in the earlier petition constitutes an abuse of the writ.

Rule 9(b) does not define the phrase "abuse of the writ." However, the legislative history of Rule 9(b) indicates that Congress intended to codify the principles governing abuse of the writ set forth in the leading case of *Sanders v. United States*, 373 U.S. 1 (1963). H.R. Rep. No. 1471, 94th Cong., 2d Sess. at 5-6, *reprinted in* 1976 U.S. Code Cong. & Admin. News 2478, 2482 (quoting *Sanders*, 373 U.S. at 17). Thus, we must look to *Sanders* to determine what constitutes an abuse of the writ. *Rose v. Lundy*, 455 U.S. 509, 521 (1982) (plurality opinion of O'Connor, J.) ("Rule 9(b) incorporates the judge-made principle governing the abuse of the writ test set forth in *Sanders*"); *id.* at 534 (Brennan, J., concurring in part and dissenting in part) (interpretation of Rule 9(b) "necessarily entails an accurate interpretation of the *Sanders* standard").

[13] The Court in *Sanders* discussed the abuse of the writ doctrine as follows:

> if a prisoner *deliberately withholds* one of two grounds for federal collateral relief at the time of filing his first application, in the hope of being granted two hearings rather than one or for some other such reason, he may be deemed to have waived his right to a hearing on a second application presenting the withheld ground. . . . Nothing in the traditions of habeas corpus requires the federal courts to tolerate needless piecemeal litigation, or to entertain collateral proceedings whose only purpose is to vex, harass, or delay.

373 U.S. at 18 (emphasis added); *Richmond v. Ricketts*, 774 F.2d 957, 961 (9th Cir. 1985). The proper inquiry then in determining whether a habeas petitioner has abused the writ by failing to raise a claim in a prior habeas petition is "whether he withheld it without legal excuse." *Jones v.*

Estelle, 722 F.2d 159, 163 (5th Cir. 1983) (en banc), *cert. denied sub nom. Jones v. McKaskle*, 466 U .S. 976 (1984). Legal excuse is demonstrated when, for example, new facts have arisen since the prior petition which were not reasonably ascertainable at the time of the filing of the earlier petition, or the law has changed in some substantive manner in the interim. *Id.* at 165, 169.

In rejecting the State's Rule 9(b) claim, the district court stated:

> Harris' contention that death qualified juries do not represent a fair cross section of the community was presented in his first petition and rejected by this court. *Petition I, 82-0249* at 93-95. The other two prongs of the death qualification argument were not exhausted at the state level when Harris filed his first petition in March 1982. Harris risked dismissal of his entire petition had he included unexhausted claims with exhausted arguments. *Rose v. Lundy*, 455 U.S. 509 (1982); *Powell v. Spaulding*, 679 F.2d 163, 166, n.2 (9th Cir. 1982).

We review *de novo* whether a claim was exhausted in state court. *Kim v. Villalobos*, 799 F.2d 1317, 1320 (9th Cir. 1986). "A state prisoner seeking federal habeas corpus review of his conviction ordinarily must first exhaust available state remedies." *Id.* at 1319; 28 U.S.C. § 2254(b), (c).

[14] Our independent review of the record reveals the district court's conclusion is not supported by the record. Harris had exhausted his state remedies as to *all* three prongs of his "death qualification" argument when the California Supreme Court denied his petition for a writ of habeas corpus on October 10, 1980, prior to the filing of his federal petition on March 5, 1982. Harris' state petition raised all three prongs:

> The excusal for cause of jurors who, while unalterably opposed to the imposition of the death penalty,

> can nevertheless fairly determine the guilt or innocence of the defendant, denied petitioner a fair trial by an impartial jury on the issues of his guilt or innocence, the degree of his offense if guilty, and the truth or untruth of the special circumstances alleged. The process of excluding prospective jurors for cause based on opposition to the death penalty (i.e., "death qualification") in a situation where, as here, a single jury heard both the guilt and penalty phases of petitioner's bifurcated trial renders that jury impermissibly prosecution-prone, more likely to convict than a jury which is properly representative of a cross-section of the community and incapable of functioning as an impartial and effective safeguard of petitioner's rights guaranteed by state and federal constitutional provisions.

Thus, Harris' claim that he had not exhausted state post conviction proceedings on this issue is without merit.

Alternatively, Harris asserts that he did not abuse the writ under Rule (b) because he has acquired "newly developed scientific evidence" on the death qualification issue which was not available when he filed his first federal petition. This argument is supported by the record.

In Harris' first state petition for a writ of habeas corpus filed concurrently with his automatic appeal to the California Supreme Court, Harris incorporated the statistical evidence proffered in *Hovey v. Superior Court*, 28 Cal. 3d 1, 616 P.2d 1301; 168 Cal. Rptr. 128 (1980), a capital case then pending in the California Supreme Court, with his death qualification claim. One of the reasons the California Supreme Court rejected Harris' "death qualification" claim was that the statistical evidence he relied upon did not take into "consider[ation] the differences between a '*Witherspoon*-qualified' jury and a 'California death-qualified' jury." *Hovey*, 28 Cal. 3d at 69, 616 P.2d at 1346, 168 Cal. Rptr. at 174; *see*

Harris, 28 Cal. 3d at 960, 623 P.2d at 253, 171 Cal. Rptr. at 692-93 (Harris' death qualification claim was based on *Hovey*). Harris explains that after he filed his first federal petition on March 5, 1982, his attorney McCabe became aware of new statistical evidence presented in the capital case *People v. Word and Sparks*, S.F. No. 14376, on this issue. Harris asserts that the "newly developed scientific evidence" presented during the *Word and Sparks* proceedings takes into consideration the "California death-qualified" jury. The State has not offered evidence that this material was not "newly developed." Because of Harris' showing that he has discovered evidence not reasonably ascertainable at the time of his first federal petition, the district court did not abuse its discretion in rejecting the State's Rule 9(b) abuse of the writ claim.

B. *Propriety of Exclusion of "Witherspoon-excludables" from the Petit Jury*

[15] In *Lockhart v. McCree*, 476 U.S. 162 (1986), the Supreme Court held that the United States Constitution does not "prohibit the removal for cause, prior to the guilt phase of a bifurcated capital trial, of prospective jurors whose opposition to the death penalty is so strong that it would prevent or substantially impair the performance of their duties as jurors at the sentencing phase of the trial." *Id.* at 165. The Court rejected the defendant's contention that "death qualification" of the jury violated his right under the sixth and fourteenth amendments to an impartial jury selected from a representative cross section of the community. *Id.* at 173-77, 183-84. Harris has advanced many of the same arguments the Supreme Court expressly rejected in *McCree*.

As the Supreme Court recently noted, "[t]here is no reason to revisit the issue whether social-science literature conclusively shows that 'death-qualified' juries are 'conviction-prone.'" *Buchanan v. Kentucky*, 483 U.S. __, 107 S. Ct. 2906, 2913 n.16 (1987). Just as it was assumed in *McCree* and

Buchanan that the studies presented in those cases were "both methodologically valid and adequate to establish that 'death qualification' in fact produces juries somewhat more 'conviction-prone' than 'non-death-qualified' juries," *McCree*, 476 U.S. at 173; *Buchanan*, 107 S. Ct. at 2913 n.16, we make a similar assumption here concerning similar studies presented by Harris.

[16] The Supreme Court's reasoning in *McCree* requires rejection of Harris' contention that "death qualification" violated his right to a jury selected from a representative cross-section of the community. The fair cross-section requirement does not apply to petit juries. The fair cross-section rule is limited to the method of summoning the venire panel from which the petit jury is selected. *McCree*, 476 U.S. at 173-74. No violation of the sixth amendment's fair cross-section requirement has been shown in this matter.

[17] The analysis in *McCree* also forecloses Harris' claim that the removal of "*Witherspoon*-excludables" resulted in the selection of a conviction-prone jury. The Court in *McCree* stated that even though " 'death qualification' in fact produces juries somewhat more 'conviction prone' than 'non-death-qualified' juries. . . . the Constitution does not prohibit the States from 'death qualifying' juries in capital cases." 476 U.S. at 173.

Harris finally claims that "death qualification" denied him a "jury capable of fulfilling functions contemplated by the right to a jury trial." Harris asserts that "death qualification" results in a jury which is "less likely to overcome the biases of its members or to arrive at an accurate and objective result through the counterbalancing of the prejudices and proclivities of individual jurors." This argument is merely a restatement of Harris' fair cross-section argument. *Accord Smith v. Balkcom*, 660 F.2d 573, 584 & n.29 (5th Cir. Unit B 1981) (defendant's claim that "death qualification" denies him his right to a properly functioning jury is "simply another way of

claiming that the jury which convicted him was not fairly representative of the community"), *modified*, 671 F.2d 858 (1982) (per curiam).

V. DISCRIMINATORY APPLICATION OF THE DEATH PENALTY

[18] Harris contends the district court erred in denying his requests for discovery and an evidentiary hearing in order to prove his allegations that the California death penalty statute violates his right to equal protection under the fourteenth amendment and the eighth amendment prohibition against cruel and unusual punishment because it is applied discriminatorily against defendants convicted of murdering whites, and against males between 25 and 34 years of age.

A. *District Court's Compliance With This Court's Prior Decision*

Harris initially contends that this court ordered the district court to conduct an evidentiary hearing upon remand in *Harris I*. Harris misconstrues our prior opinion. In our prior opinion, we stated in reference to Harris' discrimination claims:

> We do not believe that the State accorded Harris a full and fair hearing on these constitutional claims. Although we do not decide whether Harris has a right to a hearing in federal court under *Pierce [v. Cardwell*, 572 F.2d 1339, 1340-41 (9th Cir. 1978)], we believe that the district court should, if it becomes necessary, provide an opportunity to develop the factual basis and arguments concerning the race-discrimination and gender-discrimination claims.

692 F.2d at 1197. We also held that Harris' conclusory allegations in his age discrimination claim were insufficient "to

obtain a hearing in federal court. . . . absent some stronger showing." *Id.* at 1199.

[19] Our order that an opportunity to develop the evidence "if it becomes necessary," left the decision to the district court whether an evidentiary hearing would be required. *See Shaw v. Martin*, 733 F.2d 304, 313 (4th Cir.) (defendant was not entitled to an evidentiary hearing on his contention that South Carolina's death penalty statute was discriminatorily applied because "[t]he proffered evidence would not have been of sufficient probative value on the issue of discriminatory intent to have required response, and no evidentiary hearing was therefore required") (citing *United States v. Duncan*, 598 F.2d 839, 869 (4th Cir.), *cert. denied*, 444 U.S. 871 (1979)), *cert. denied*, 469 U.S. 873 (1984). The district court, on remand, permitted Harris to submit updated statistical studies and declarations on his discrimination allegations. It was under no compulsion from this court to hold an evidentiary hearing.

B. *Denial of the Request for Discovery and an Evidentiary Hearing*

Harris moved for discovery under Rule 6(a) of the Rules Governing Section 2254 Cases, 28 U.S.C. foll. § 2254 (1982). Rule 6(a) provides for discovery in habeas corpus proceedings "if, and to the extent that, the judge in the exercise of his discretion and for good cause shown grants leave to do so, but not otherwise." Harris' request for discovery was made in conjunction with his request for an evidentiary hearing on his discrimination claims.

In his discovery motion, Harris presented statistical data analyzed by Dr. James Cole "refer[ring] to convictions and death sentences stemming from homicides occurring in California in years 1978-1982." Cole's preliminary findings indicate that "someone whose victim was white had a probability of ultimately receiving the death penalty approximately five

times as large as that for someone whose victim was nonwhite." Further, a male between the ages of 25 to 34 stands a significantly greater chance than other defendants of receiving the sentence of death. Based on these preliminary findings, Harris moved for an order compelling the State to produce substantial data from the California courts, including age, race and gender data of victim and defendant in each homicide prosecution in the State of California since 1977, and all transcripts of all California penalty trials relating to "offenses committed on or after" 977.[5]

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[5]Harris' motion for discovery requested the State to provide the following information:

1. The defendant's name, case number, and county of venue of each homicide prosecution for an offense occurring on or after August 11, 1977, in which any special circumstance was alleged, and which resulted in at least one conviction of murder in the first or second degree or manslaughter.

2. The defendant's name, case number, and county of venue of each homicide prosecution for an offense occurring on or after August 11, 1977, in which no special circumstance was alleged, but which resulted in (1) a conviction for murder in the first or second degree or manslaughter, and (2) a conviction for any felony enumerated in Penal Code Section 190.1(a)(17) — robbery, kidnapping, rape, sodomy, child molesting, oral copulation, burglary, arson, or train wrecking.

3. The defendant's name, case number, county of venue of each homicide prosecution for an offense occurring on or after August 11, 1977, in which no special circumstance was alleged, but which resulted in at least one conviction for first degree murder and at least one other conviction for at least second degree murder.

4. For each case listed in the response to (1) above, the age, race and gender of each defendant, and the age, race, and gender of each decedent.

5. For each case listed in the response to (2) above, the age, race and gender of each defendant; and the age, race, and gender of each decedent.

To be entitled to an evidentiary hearing, Harris must demonstrate that (1) "he has alleged facts which, if proved, would entitle him to relief, and (2) an evidentiary hearing is required to establish the truth of his allegations." *Harris I*, 692 F.2d at 1197 (citing *Pierce*, 572 F.2d at 1340-41); *Townsend v. Sain*, 372 U.S. 293, 312 (1963). The district court did not grant Harris' motion for discovery or request for an evidentiary hearing because it held that, even assuming the truth of Harris' factual statistical allegations, his discrimination claims failed.

20] An evidentiary hearing would be necessary to hear any evidence that a *particular* defendant was discriminated against because of his race, age, or gender. But as we discuss in the next section of this opinion, general statistical studies of the kind offered here do not prove discrimination. Moreover, it is not necessary to conduct a full evidentiary hearing as to studies which do nothing more than show an unexplainable disparity.

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6. For each case listed in the response to (3) above, the age, race and gender of each defendant; and the age, race and gender of each decedent.

7. Petitioner requests that respondent make available for inspection and copying the computer tape computed by the California Department of Justice, Bureau of Criminal Statistics, containing information about all homicides in California occurring on or after August 11, 1977.

8. Petitioner requests that respondent make available for inspection and copying the transcripts of all California penalty trials relating to offenses committed on or after August 11, 1977.

Petitioner further requests permission to obtain an expert to be appointed by the Court to analyze and report on the data described above, and to present the results of this analysis and report in support of an evidentiary hearing to establish the substance of petitioner's arbitrariness and discrimination claims.

C. *Applicability of McCleskey v. Kemp*

Last term, the Supreme Court in *McCleskey v. Kemp*, 481 U.S. __, 107 S. Ct. 1756 (1987), considered the use of statistical studies to prove discriminatory treatment. Because Harris' discrimination claims are quite similar to the defendant's contentions in *McCleskey*, we discuss the Supreme Court's decision in some detail.

In *McCleskey*, the defendant contended the Georgia capital sentencing process was administered in a racially discriminatory manner in violation of the eighth and fourteenth amendments to the United States Constitution. *Id.* at 1763. In support of his claim, the defendant proffered a statistical study that purported to show a disparity in the imposition of the death sentence in Georgia based on the race of the murder victim and, to a lesser extent, the race of the defendant. The statistical study examined over 2,000 murder cases which occurred in Georgia during the 1970s. The raw data indicated that defendants charged with killing white persons received the death penalty in 11% of the cases, but defendants charged with killing blacks received the death penalty in only 1% of the cases. The studies also examined the relationship between the race of the defendant and the victim.

The data was subjected to an "extensive analysis" taking into account 230 variables that could have explained the disparities on nonracial grounds. *Id.* at 1764. One of the models concluded that "even after taking account of 39 nonracial variables, defendants charged with killing white victims were 4.3 times as likely to receive a death sentence as defendants charged with killing blacks." *Id.*

In analyzing the defendants eighth and fourteenth amendment challenges, the Court "assume[d] the study is valid statistically without reviewing the factual findings of the District Court." *Id.* at 1766 n.7. The assumption that the studies were valid did not include the assumption that the studies showed

that racial considerations actually entered into any sentencing decisions in Georgia, but only demonstrated a "*risk* that the factor of race entered into some capital sentencing decisions and a necessarily lesser risk that race entered into any particular sentencing decision." *Id.* (emphasis in original).

1. Proof of Purposeful Discrimination

The Court reiterated that "a defendant who alleges an equal protection violation has the burden of proving 'the existence of purposeful discrimination'," *id.* at 1766 (quoting *Whitus v. Georgia*, 385 U.S. 545, 550 (1967)) (footnote omitted), and that "the purposeful discrimination 'had a discriminatory effect' on him," 107 S. Ct. at 1766 (quoting *Wayte v. United States*, 470 U.S. 598, 608 (1985)). Thus, the Court held, "to prevail under the Equal Protection Clause, McCleskey must prove that the decisionmakers in *his* case acted with discriminatory purpose." 107 S. Ct. at 1766 (emphasis in original). McCleskey had offered no evidence that would support an inference that racial consideration played a part in *his* sentence, but instead relied on statistical studies, arguing the studies compelled an inference that his sentence rests on purposeful discrimination. *Id.* at 1767. McCleskey had argued that the statistics were "sufficient proof of discrimination, without regard to the facts of a particular case . . . ." *Id.*

The Court noted that it had accepted statistics as proof of intent in certain limited contexts, e.g., equal protection violation in selection of the jury venire in a particular district and in the form of multiple regression analysis to prove statutory violations under Title VII, *id.* at 1767, but "the application of an inference drawn from the general statistics to a specific decision in a trial and sentencing simply is not comparable to the application of an inference drawn from general statistics to a specific venire-selection or Title VII case." *Id.* 1767-68. The important differences between the cases in which the Court has accepted statistics as proof of discriminatory intent is that, in the venire-selection and Title VII contexts, (1) "the

statistics relate to fewer entities, and fewer variables are relevant to the challenged decisions," and (2) "the decisionmaker has an opportunity to explain the statistical disparity." *Id.* at 1768 (footnotes omitted). Because implementing criminal laws against murder necessarily involves discretionary judgment, the Court stated that it "would demand exceptionally clear proof before we would infer that the discretion has been abused." *Id.* at 1769. The Court held:

> The unique nature of the decisions at issue in this case also counsel against adopting such an inference from the disparities indicated by the Baldus study. Accordingly, we hold that the Baldus study is clearly insufficient to support an inference that any of the decisionmakers in McCleskey's case acted with discriminatory purpose.

Id.

In the matter before us, Harris proffered a statistical study performed by James Cole which purports to show a disparity in the imposition of the death sentence in California based on the race of the murder victim. Both murder victims in this case were white. Harris is also white. The Cole study is actually two statistical studies that examine 238 cases which resulted in the penalty of death involving intentional homicides and robbery homicides in California from 1978 to 1982. The raw numbers analyzed by Cole indicated that murders involving white victims accounted for 76.5% of all death sentences for intentional homicides in California. By contrast, only 38.7% of the intentional homicides committed at that time involved white victims. Cole concluded that someone whose victim was white had a five times greater possibility of receiving the death penalty than someone whose victim was nonwhite.

In the second study involving robbery homicides, Cole indicated that crimes involving white victims accounted for

73% of all death sentences in California. By contrast, only 46.5% of the robbery homicides committed involved white victims. Cole concluded that someone committing robbery murder on a white victim had approximately three times the possibility of ultimately receiving the death sentence as someone committing the crime on a nonwhite victim.

As to the gender discrimination claim, Harris submitted declarations showing that in California between 1978 and 1982, 2,179 persons were convicted of murder, of which only approximately 94, or 4.3%, were female. Of the 144 persons sentenced to death during that period, none were female. Harris' expert witness concluded the total exclusion of women from the pool of those defendants receiving the death sentence is indicative of gender influencing the sentencing process.

As to the age discrimination claim, Harris submitted affidavits by Dr. Cole showing that in California between 1981 and 1982, the number of persons in the 25 to 29 and 30 to 34 year age groups were disproportionately higher than those defendants receiving the death sentence. Dr. Cole relied on the following comparisons:

Age Group	Death Sentence Recipients in Age Group	Persons Arrested for Murder in Age Group
20-24	20.2%	33.4%
25-29	35.1	25.4
30-34	31.1	16.4
35-39	6.8	9.1
40+	6.8	15.7
Total	100.0%	100.0%

[21] Harris' statistical proffer of evidence, even assuming the truth of his allegations, does not entitle him to an evidentiary hearing or discovery on his equal protection claim. Harris has not demonstrated that the decisionmakers in his case acted with discriminatory purpose on the basis of the race of

his two victims, his gender or age. Harris' statistical evidence does not provide "exceptionally clear proof" that the jury in his case abused its discretion in recommending the sentence of death. In *McCleskey*, the defendant's study revealed that someone charged with killing a white victim was 4.3 times as likely to receive a death sentence as a defendant charged with killing a black victim. Harris' study only reveals a marginally higher ratio, i.e., five times as likely.

As to Harris' gender discrimination claim, Harris' statistics show that while 94 women, or 4.3%, were convicted of murder during this time period, none of the 144 persons sentenced to death during this period were female. These statistics fail to demonstrate if any of the 94 women (1) committed crimes which permitted their execution, or (2) were eligible for the death sentence.[6] "Other than the mere fact that there are no women on death row, there is nothing to support the claim that women are not there because of discrimination." *Richmond v. Ricketts*, 640 F. Supp. 767, 802 (D. Az. 1986). These statistical flaws are fatal to Harris' claim. Not only did his statistics not entitle him to discovery or an evidentiary hearing on this claim, but they do not present the "exceptionally clear proof" required to demonstrate purposeful discrimination.

Harris' age discrimination claim likewise suffers from an inadequate showing. The statistical differences are legally insufficient to support his age discrimination claim. Accordingly, we hold that the Cole study is clearly insufficient to support an inference that any of the decisionmakers in Harris' case acted with discriminatory purpose. Harris was not entitled to an evidentiary hearing or discovery.

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[6]In California, the legislature has limited the imposition of the death penalty to a small subclass of homicides. A defendant is only eligible for the death penalty *if* the jury finds (1) the defendant guilty of first degree murder, Cal. Penal Code §§ 190.1(a), (b), 190 (1977), *and* (2) at least one "special circumstance" which the prosecution charged to be true, *id.* at § 190.2(a)-(c).

2. Eighth Amendment Claim

[22] Harris next contends that the California capital sentencing system is arbitrary and capricious in *application* in violation of the eighth amendment prohibition against cruel and unusual punishment because racial, age and gender considerations may influence capital sentencing decisions in California. The Supreme Court rejected a similar claim in *McCleskey*, 107 S. Ct. at 1775.

The Court noted that the Baldus study, similar to but more complex than the Cole study before us, did not *prove* that race enters into any capital sentencing decisions or that race was a factor in McCleskey's particular case. *Id.* The Court explained that "[s]tatistics at most may show only a likelihood that a particular factor entered into some decisions. There is, of course, some risk of racial prejudice influencing a jury's decision in a criminal case. There are similar risks that other kinds of prejudice will influence other criminal trials." *Id.* The inquiry becomes " 'at what point [does] that risk become constitutionally unacceptable.' " *Id.* (quoting *Turner v. Murray*, 476 U.S. 28, 36 n.8 (1986)). The Supreme Court in *McCleskey* held that the Baldus study did not demonstrate the "constitutional measure of an unacceptable risk" of racial prejudice. 107 S. Ct. at 1775.

The Court reasoned that "a capital sentencing jury representative of a criminal defendant's community assures a ' " 'diffused impartiality' " ' in the jury's task of 'express[ing] the conscience of the community on the ultimate question of life or death.' " *Id.* at 1776 (citations omitted) (footnote omitted). Acknowledging that the Baldus study at most indicates "a discrepancy that appears to correlate with race," *id.* at 1777, the Court stated that "[a]pparent disparities in sentencing are an inevitable part of our criminal justice system" because "any mode for determining guilt or punishment 'has its weaknesses and the potential for misuse.' " *Id.* at 1777-78 (citations omitted) (footnote omitted). The Court then held:

> Despite these imperfections, our consistent rule has been that *constitutional guarantees are met when "the mode [for determining guilt or punishment] itself has been surrounded with safeguards to make it as fair as possible."* Where the discretion that is fundamental to our criminal process is involved, we decline to assume that what is unexplained is invidious. In light of the safeguards designed to minimize racial bias in the process, the fundamental value of jury trial in our criminal justice system, and the benefits that discretion provides to criminal defendants, we hold that the Baldus study does not demonstrate a constitutionally significant risk of racial bias affecting the Georgia capital-sentencing process. . . . [¶] The Constitution does not require that a State eliminate any demonstrable disparity that correlates with a potentially irrelevant factor in order to operate a criminal justice system that includes capital punishment.

Id. at 1778, 1781 (emphasis added) (citation omitted) (footnote omitted). With these principles of law in mind, we analyze Harris' eighth amendment claim.

The Cole study does not prove that the factors of race, gender or age entered into any capital sentencing decision in California or that these elements were factors in Harris' particular case. At most, the Cole study demonstrates a discrepancy that may correlate with the race of Harris' victims, Harris' gender and age. California's capital sentencing system does not contain the systemic arbitrariness and capriciousness in the imposition of capital punishment found in statutory schemes invalidated by *Furman v. Georgia*, 408 U.S. 238 (1972). In *Pulley v. Harris*, the Supreme Court examined California's capital sentencing statute.[7] The Court held that "this

[7]The Supreme Court explained, in detail, California's 1977 capital sentencing statute:

system, without any requirement or practice of comparative proportionality review, cannot be successfully challenged

Under this scheme, a person convicted of first-degree murder is sentenced to life imprisonment unless one or more "special circumstances" are found, in which case the punishment is either death or life imprisonment without parole. Cal. Penal Code Ann. §§ 190, 190.2 (West Supp. 1978). Special circumstances are alleged in the charging paper and tried with the issue of guilt at the initial phase of the trial. At the close of evidence, the jury decides guilt or innocence and determines whether the special circumstances alleged are present. Each special circumstance must be proved beyond a reasonable doubt. § 190.4(a). If the jury finds the defendant guilty of first-degree murder and finds at least one special circumstance, the trial proceeds to a second phase to determine the appropriate penalty. Additional evidence may be offered and the jury is given a list of relevant factors. § 190.3. "After having heard and received all of the evidence, the trier of fact shall consider, take into account and be guided by the aggravating and mitigating circumstances referred to in this section, and shall determine whether the penalty shall be death or life imprisonment without the possibility of parole." *Ibid.* If the jury returns a verdict of death, the defendant is deemed to move to modify the verdict. § 190.4(e). The trial judge then reviews the evidence and, in light of the statutory factors, makes an "independent determination as to whether the weight of the evidence supports the jury's findings and verdicts." *Ibid.* The judge is required to state on the record the reasons for his findings. *Ibid.* If the trial judge denies the motion for modification, there is an automatic appeal. §§ 190.4(e), 1239(b). The statute does not require comparative proportionality review or otherwise describe the nature of the appeal. It does state that the trial judge's refusal to modify the sentence "shall be reviewed." § 190.4(e). This would seem to include review of the evidence relied on by the judge. As the California Supreme Court has said, "the statutory requirements that the jury specify the special circumstances which permit imposition of the death penalty, and that the trial judge specify his reasons for denying modification of the death penalty, serve to assure thoughtful and effective appellate review, focusing upon the circumstances present in each particular case." *People v. Frierson*, 25 Cal. 3d, at 179, 599 P.2d at 609. That court has reduced a death sentence to life imprisonment because the evidence did not support the findings of special circumstances. *People v. Thompson*, 27 Cal. 3d 303, 611 P.2d 883 (1980).

under *Furman* and our subsequent cases." 465 U.S. at 53. Thus, we hold that the Cole study does not demonstrate a constitutionally significant risk of racial, gender or age bias affecting the California capital sentencing process.

VI. FAILURE TO GIVE PROPER INSTRUCTION ON AGE DISCRIMINATION

[23] Harris also contends that the death sentence was arbitrarily imposed as a result of the "uniquely ambiguous" provisions of California's capital sentencing statute, Cal. Penal Code § 190.3(h) (1977), because the statute permits arbitrary consideration of a defendant's age as an aggravating factor. Harris argues that section 190.3(h) is discriminatory and arbitrary because it permits age to be considered by the jury in balancing the aggravating and mitigating factors without labeling it either as aggravating or mitigating. The State argues that we should not consider this issue because Harris did not present this claim of instructional error in either his first or second federal petition nor was this issue exhausted on direct appeal or in post-conviction proceedings in the California court system.

A state prisoner who seeks relief under 28 U.S.C. § 2254 must provide the state courts a fair opportunity to correct any

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By requiring the jury to find at least one special circumstance beyond a reasonable doubt, the statute limits the death sentence to a small subclass of capital-eligible cases. The statutory list of relevant factors, applied to defendants within this subclass, "provide[s] jury guidance and lessen[s] the chance of arbitrary application of the death penalty," 692 F.2d, at 1194, "guarantee[ing] that the jury's discretion will be guided and its consideration deliberate," *id.*, at 1195. The jury's "discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." *Gregg*, 428 U.S., at 189. Its decision is reviewed by the trial judge and the State Supreme Court.

Pulley v. Harris, 465 U.S. at 51-53 (footnotes omitted).

federal constitutional error committed in the trial court. *Picard v. Connor*, 404 U.S. 270, 275-276 (1971); *Anderson v. Harless*, 459 U.S. 4, 6 (1982)(per curiam). Thus, "the habeas petitioner must have 'fairly presented' to the state courts the 'substance' of his federal habeas corpus claim." *Anderson*, 459 U.S. at 6. "It is not enough that all the facts necessary to support the federal claim were before the state courts, or that a somewhat similar state-law claim was made." *Id.* (citations omitted). The Supreme Court recently stated:

> Because "it would be unseemly in our dual system of government for a federal district court to upset a state court conviction without an opportunity to the state courts to correct a constitutional violation," federal courts apply the doctrine of comity, which "teaches that one court should defer action on causes properly within its jurisdiction until the courts of another sovereignty with concurrent powers, and already cognizant of the litigation, have had an opportunity to pass upon the matter."

Rose, 455 U.S. at 518 (quoting *Darr v. Burford*, 339 U.S. 200, 204 (1950)).

1. *Federal Habeas Corpus Petitions.*

[24] Harris claims that the issue of instructional error concerning age discrimination was "clearly raised in the first federal habeas corpus petition, and the only new aspect of the claim is the empirical support for it which has become apparent from the accumulated experience of capital sentencing in California." The record does not support this assertion.

In Harris' Appellant's Opening Brief filed in this court, he contended he "was rendered unable to pursue his separate argument that, apart from endemic age discrimination, California's unique and open-end specification of age as a penalty factor permits particular juries to arbitrarily and capriciously

turn a defendant's age *against him* in the capital sentencing process." (Emphasis in original). Harris claims he was unable to pursue this "argument" because the district court did not permit an evidentiary hearing on this issue.

It does not appear from the record that Harris requested an evidentiary hearing on this issue. Thus, he did not properly preserve this issue for appeal to this court. Moreover, he was not entitled to an evidentiary hearing to present a purely *legal* argument. An evidentiary hearing is to present disputed facts.

The district court provided Harris an opportunity to brief the issues raised in his petition, including his age discrimination claim. In response, Harris presented arguments in support of his age discrimination claims under the eighth and fourteenth amendments, but did not argue that section 190.3(h) is arbitrary because age is not labeled either as an aggravating or mitigating factor. Harris admits he did not raise this precise issue in the district court.

We ordered Harris and the State to file supplemental briefs and to attach relevant exhibits to demonstrate wherein Harris raised this issue in his state and federal proceedings. In Harris' supplemental brief, he asserts that he raised this issue in both state and federal court. However, as we demonstrate below, this claim finds no support in the record.

2. *No Exhaustion In The State Court Proceedings.*

Harris claims he raised this issue on direct appeal to the California Supreme Court. Specifically, Harris points to arguments presented in his Appellant's Opening Brief before that court at pages 164, 166 and 167. In his Supplemental Brief, Harris states:

> [A]ppellant raised the issue of 'the need for (1) objective, unambiguous standards to guide and to chan-

> nel the sentencing authority's discretion' (Appellant's Opening Brief, p. 164 . . . [paragraph]
>
> Specifically, appellant complained that although:
>
> > . . . section 190.3 directs that the jury take into account what is termed 'aggravating' and 'mitigating' circumstances, the jury is never advised which factors listed in the statute fall into one category or the other. (See CALJIC Nos. 8.88.1, 8.89.) . . .

This argument, however, is not the same contention Harris now raises on appeal. Furthermore, we addressed this question in *Harris I*. In *Harris I*, we stated:

> Nor do we think that the statute's failure to label factors as aggravating or mitigating invalidates the statute. The Supreme Court has previously upheld the statute that did not explicitly identify factors as aggravating or mitigating but merely asked the jury to answer several particular questions. Because the California statute establishes factors to guide the jury's discretion and allows for consideration of the particular aggravating and mitigating circumstances in this case, the statute is not unconstitutional in this respect.

692 F.2d at 1194 (citation omitted).

Harris next contends he raised the instructional error issue in state post-conviction proceedings. Specifically referring to Section I of his state habeas corpus petition at page 3, Harris argues:

> the pertinent portions of the petition set forth the claims that appellant's age was used as an aggravating factor by the jury in violation of the Eighth and Fourteenth Amendments. Appellant alleged that the

> statute 'failed to limit and direct sentencing discretion'.

The issue actually presented in his state habeas corpus petition reads as follows:

> PETITIONER'S DEATH SENTENCE MUST BE REVERSED BECAUSE THE CALIFORNIA DEATH PENALTY PROVISIONS FAIL TO LIMIT AND DIRECT SENTENCING DISCRETION AND FAILED TO AFFORD MEANINGFUL APPELLATE REVIEW, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The argument that the statute is unconstitutional because it fails to limit and direct the sentencing discretion is not the same contention on appeal before us, namely that there was instructional error as to age as an arbitrary factor. The issue in fact presented to the state court was rejected in *Harris I*.

VII. NONSTATUTORY PENALTY PHASE JURY INSTRUCTION

[25] Under California's 1977 capital sentencing statute, a jury is given an instruction in the penalty phase of the trial which contains ten aggravating and mitigating factors it shall "consider, take into account and be guided by" in deciding whether to impose death or life imprisonment prison without the possibility of parole.[8] Cal. Penal Code § 190.3(a)-(j)

[8]Section 190.3 provides the following factors:

> In determining the penalty the trier of fact shall take into account any of the following factors if relevant:
>
> (a) The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true pursuant to § 190.1.

(1977). The statute does not identify or describe these factors as aggravating or mitigating. *Pulley v. Harris*, 465 U.S. at 52 n.14. The trial court in this case modified the standard instruction, California Jury Instructions, Criminal No. 8.88.1, containing these factors, and admonished the jury to consider the defendant's "character, background, history, mental condition and physical condition."

[26] On appeal, Harris contends the use of these nonstatutory factors violated his federal constitutional rights to due process and the prohibition against cruel and unusual punishment. He argues that these factors (1) do not genuinely nar-

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(b) The presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the expressed or implied threat to use force or violence.

(c) Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(d) Whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act.

(e) Whether or not the offense was committed under circumstances which the defendant reasonably believed to be a moral justification or extenuation for his conduct.

(f) Whether or not the defendant acted under extreme duress or under the substantial domination of another person.

(g) Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or the affects of intoxication.

(h) The age of the defendant at the time of the crime.

(i) Whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor.

(j) Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime.

row the class of persons eligible for the death penalty, and (2) do not reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder. He asserts further that these factors should actually militate in favor of a lesser penalty. He also contends that these factors are so unconstitutionally broad and vague in their meaning and limitless in their application that they do not provide a sentencing standard capable of promoting a consistent and rational application of the death penalty. The State asks that we decline to review this issue under Rule 9(b).

A. *Insufficient Showing of Abuse of the Writ*

The State argued before the district court that the alleged instructional error should not be adjudicated because Harris abused the writ under Rule 9(b). The district court reached the merits of Harris' claim, and thus impliedly rejected the State's Rule 9(b) argument. On appeal, the State claims Rule 9(b) provides "an independently sufficient reason to affirm the District Court's rejection of this claim."

The State contends Harris abused the writ under Rule 9(b) because he did not raise this issue in his first petition. The State asserts that Harris' excuse for not presenting this claim in his first federal petition — "the claim was not raised in petitioner's previous section 2254 petition due to neglect or ineffectiveness of petitioner's previous appointed appellate counsel [Michael McCabe]" — is not sufficient to permit the district court to consider the merits of the claim. Harris' counsel responds that he did not withhold the claim for any tactical reason, but merely "because he missed it."

The determination whether to deny a hearing or dismiss a petition is reviewed for abuse of discretion. *Sanders*, 373 U.S. at 18.

In *Richmond*, we recently addressed the procedure that is applicable where a state prisoner raises new claims in a sec-

ond petition under section 2254. 774 F.2d at 960-61. We explained the appropriate three-part standard to apply in determining whether there is an abuse of the writ under Rule 9(b):

> Previously unadjudicated claims must be decided on the merits unless [1] the petitioner has made a conscious decision deliberately to withhold them, [2] is pursuing "needless piecemeal litigation," or [3] has raised the claims only to "vex, harass, or delay."

Id. at 961 (citations omitted).

[27] There is no affirmative indication in the record, and the State does not claim, that Harris' counsel made a conscious decision deliberately to withhold this contention, to proceed by piecemeal litigation, to vex or harass the court or State, or to delay the proceedings. Thus, Harris' second federal petition did not constitute an abuse on this claim.

B. *Validity of the District Court's Determination of the Merits Of Harris' Claim*

We begin our analysis of Harris' contentions concerning the alleged instructional error looking to applicable California statutes for guidance concerning the evidence the jury can consider in selecting the proper punishment in a capital case. The introductory paragraph of section 190.3 explains the wide range of evidence that is admissible during the penalty phase:

> . . . In the proceedings on the question of penalty, *evidence* may be presented by both the people and the defendant as to *any* matter relevant to aggravation, mitigation, and sentence, *including, but not limited to,* . . . the defendant's character, background, history, mental condition and physical condition.

(Emphasis added). Thus, "[t]he admission of evidence is not limited to matters relevant to the specified aggravating or mitigating factors."[9] *People v. Murtishaw*, 29 Cal. 3d 733, 773, 631 P.2d 446, 470, 175 Cal. Rptr. 738, 762 (1981) (footnote omitted), *cert. denied*, 455 U.S. 922 (1982); *see also Barclay v. Florida*, 463 U.S. 939, 967 (1983)(Stevens, J., concurring in judgment)("the Constitution does not prohibit consideration at the sentencing phase of information not directly related to either statutory aggravating or statutory mitigating factors, as long as that information is relevant to the character of the defendant or the circumstances of the crime")(citing cases). "[T]he jury [i]s free, after considering the listed aggravating and mitigating factors, to consider any other matter it thought relevant to the penalty determination." *Boyd*, 38 Cal. 3d at 773, 700 P.2d at 790, 215 Cal. Rptr. at 9. Thus, psychiatric evidence is admissible to show defendant's present "character, background, history, mental condition and physical condition." *Murtishaw*, 29 Cal. 3d at 774 n.39, 631 P.2d at 470 n.39, 175 Cal. Rptr. at 762 n.39.

Harris argues that the court's modified instruction permitted the use of mental or physical condition as an aggravating factor "so as to arbitrarily weigh a sentencing decision in favor of death." The court's modified instruction cannot be reasonably so construed.

During the guilt phase of the trial, Harris testified that he had nothing to do with the murders. During the penalty phase, Harris recanted that testimony, and expressly admitted the crimes and stated he was "sorry." He sought to sup-

[9]As we noted in footnote 1, the case before us arises under California's 1977 capital sentencing statute. In interpreting a different version of § 190.3 under the *1978* statute, the California Supreme Court held the jury can only consider evidence relevant to the specific factors enumerated in § 190.3. *People v. Boyd*, 38 Cal. 3d 762, 773-75, 700 P.2d 782, 790-92, 215 Cal. Rptr. 1, 9-11 (1985).

port his claim of remorse by calling Deputy Sherrif Mendoza who testified that when he inquired into Harris' emotional state after he cut his arm in an alleged suicide attempt, Harris appeared to feel remorse for his crimes.

Harris points to the testimony of Dr. Wait Griswold, a psychiatrist who had examined Harris in the early morning hours of July 6, 1978, to demonstrate that the nonstatutory factors of mental and physical condition were used by the prosecution as aggravating circumstances. Dr. Griswold was called by the prosecution to testify in rebuttal to Harris' claim of remorse. The psychiatrist testified that he was of the opinion that Harris had a personality disorder known as an "antisocial personality" in psychiatric nomenclature.

Antisocial personality is listed as No. 301.70 in *DSM-II: Diagnostic and Statistical Manual of Mental Disorder* (3d ed. 1980) (hereinafter *DSM III*). This disorder is also known as a "psychopathic" or "sociopathic" personality. This personality disorder is not a neurosis or a psychosis. An individual is not born with this personality disorder; rather, it is a product of the individual's background, upbringing, and environment.

Dr. Griswold testified that an antisocial individual tends to be immature, emotionally unstable, callous, irresponsible, manipulative, impulsive, egotistical, has an inability to profit from past experience or punishment, projects the blame on someone else, and does not feel true remorse for crimes he commits. He stated this type of individual would be able to have the capacity to appreciate the criminality of his actions, the ability to control his actions, and to deliberate and premeditate upon a murder.

The factors the jury was asked to consider concerning the defendant's "character, background, mental condition, and physical condition" were stated neutrally. They were not described as aggravating or mitigating. The jury heard that

Harris had a dismal childhood, and the evidence showed that his father had severely beaten Harris when he was an infant. There was also evidence about his minimal education, the conviction of his father for sexually molesting his sister, and his mother's conviction for bank robbery. Under the court's instruction all of the foregoing evidence could be considered in mitigation of the punishment Harris should suffer for his crimes. The Supreme Court has often repeated the principle that "[w]hat is important at the selection [of punishment] stage is an *individualized* determination on the basis of the character of the individual and the circumstances of the crime." *Zant v. Stephens*, 462 U.S. 862, 879 (1983)(emphasis in original)(citing cases). Evidence of a defendant's character, background, history, mental condition and physical condition permit such a determination. The court's instruction impartially informed the jury that it was proper to consider such evidence in selecting the appropriate punishment.

Citing to language in *Zant v. Stephens*, 462 U.S. at 885, Harris claims the "trial court permitted appellant's sentencing jury to find as aggravating factors which '. . . actually should militate in favor of a lesser penalty, such as perhaps the defendant's mental illness.'" The Supreme Court in *Stephens* cited *Miller v. Florida*, 373 So.2d 882 (Fla. 1979) for this proposition.

In *Miller*, after the defendant had been charged with murder, he was found incompetent to stand trial and committed to the state mental hospital. After two and one-half years of confinement and treatment, he was found sufficiently competent to stand trial; his mental illness was in remission through the use of tranquilizing drugs. Testimony was presented at the sentencing hearing that the defendant was suffering from paranoid schizophrenia and hallucinations. He had been committed to mental hospitals on several previous occasions.

The trial judge, during the penalty phase, concluded that "the mental sickness or illness that [defendant] suffers from is

such that he will never recover from it, it will only be repressed by the use of drugs." *Id.* at 885. Relying principally on this factor, the judge sentenced defendant to death because this was the "only assurance society can receive that this man never again commits to another human being what he did to that lady . . . ." *Id.*

Miller is clearly distinguishable from the circumstances presented in the instant matter. The primary reason that the Florida Supreme Court reversed the sentence of death is that the trial judge relied on a *nonstatutory* aggravating factor. Under Florida law, a trial judge is not permitted to consider a nonstatutory circumstance in selecting the proper penalty. Furthermore, the evidence concerning Harris' "mental condition" is distinguishable from the evidence of psychosis (paranoid schizophrenia) relied upon by the trial judge in *Miller*. Dr. Griswold testified Harris had a personality disorder, i.e., antisocial personality, DSM III 301.70, and expressly distinguished this type of mental disorder from a psychosis or neurosis. A personality disorder is not analagous to "the incurable and dangerous mental illness" of a person diagnosed as suffering from paranoid schizophrenia and hallucinations.

The jury is entitled to consider the character of the defendant during the penalty phase to make an individualized determination of the sentence. *Stephens*, 462 U.S. at 879. The defendant properly introduced evidence at the penalty phase that he felt remorse notwithstanding his earlier testimony that he did not commit the homicides. The prosecution was also entitled to rebut this belated recantation and acceptance of responsibility by introducing evidence about Harris' background and personality to his attempt to mitigate his homicidal conduct. "[T]he presence or absence of remorse is a factor relevant to the jury's penalty decision" in a capital case. *People v. Ghent*, 43 Cal. 3d 739, 771, 739 P.2d 1250, 1271, 239 Cal. Rptr. 82, 103 (1987). The instruction permitting the jury to consider the defendant's "character, background, his-

tory, mental condition, and physical condition" properly narrowed the class of persons eligible for the death penalty who reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder. *Stephens*, 462 U.S. at 877. The giving of the modified instruction was not error.

We AFFIRM the order of the district denying the petitions for writ of habeas corpus. We VACATE our stay of execution.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ROBERT ALTON HARRIS, *Petitioner,* v. R. PULLEY, Warden OF THE CALIFORNIA STATE PRISON AT SAN QUENTIN, CALIFORNIA, *Respondent.*	No. 84-6433 D.C. Nos. CR 82-0249-E and CR 82-1005-E ORDER AMENDING OPINION

Filed September 28, 1989

Before: Arthur L. Alarcon, Melvin Brunetti and John T. Noonan, Jr., Circuit Judges.

ORDER

The opinion in this matter filed July 8, 1988, is amended as follows:

1. Slip. op. at 8394. In the second full paragraph change "(hereinafter *DSM* III)" to "(hereinafter DSM II)."

2. Slip. op. at 8396. In the first full paragraph, change "DSM III" to "DSM II."

3. Slip op. at 8396. Add the following text at the end of the first full paragraph:

> *DSM-II*, which Dr. Griswold relied on during his testimony, lists specified "mental disorders." These disorders include such conditions as anxiety neuro-

EXHIBIT B

sis or "anxious over-concern;" [*DSM-II* § 300.00] obsessive compulsive neurosis or the persistent intrusion of unwanted thoughts, urges, or actions that the patient is unable to stop;" [*DSM-II* § 300.3] neurasthenic neurosis, "characterized by complaints of chronic weakness, easy fatigability and sometimes exhaustion;" [*DSM-II* § 300.5] and a variety of other neuroses such as "writer's cramp." All of these neuroses disturb mental functioning and those suffering the problem are aware that their functioning is disturbed.

In distinction from these neuroses are a group of personality disorders "characterized by deeply ingrained maladaptive patterns of behavior." *DSM-II* § 301. These disorders include an obsessive compulsive personality, otherwise known as anankastic personality, a condition characterized "by excessive concern with conformity and adherence to standards of conscience." *Id.* § 301.4. There is also an "asthenic personality," distinguished from the related neuroses by being a behavior pattern marked by "easy fatigability, low energy level, lack of enthusiasm, marked incapacity for enjoyment, and oversensitivity to physical and emotional stress." *Id.* § 301.6. The diagnostic category "antisocial personality" is one of these personality disorders. *Id.* § 301.7.

It is a question of first impression whether all or any conditions classified as mental disorders by the American Psychiatric Association must be recognized by a state as a mitigating factor in imposing capital punishment. They are from one point of view "can't helps" — characteristics of an individual that no single act of volition on the individual's part would change. From another point of view, they are characteristics which to the ordinary lay person are

part of an individual's personality or character, and any judgment about personality or character would take them into account.

Considering the specified and unspecified neuroses and the specified types of personality disorders, one is aware that the diagnostic categories of the American Psychiatric Association fit a number of persons who function in American society without treatment and who form part of the general society. An estimate of the prevalence of antisocial personality disorder, made in 1980 after the trial in this case, was that about three percent of American males suffered from it. *DSM-III*, p. 319.

The DSM is prepared by the American Psychiatric Association primarily to identify conditions which members of the Association may diagnose. To a considerable degree, these psychiatrists have determined mental disorders by the morals and conventions of our society. Most dramatically, in *DSM-II*, under the general category of "Personality Disorders and Certain Other Non-Psychiatric Disorders," there was a subcategory "Sexual Deviations," a classification "for individuals whose sexual interests are directed primarily towards objects other than people of the opposite sex . . ." *DSM-II* n.302 (1968). This general definition of sexual deviation as a mental disorder was in conflict with the definition that followed of homosexuality, which was accepted as not in itself a psychiatric disorder and treated as a psychiatric disorder only for those who wished to change their sexual orientation. In *DSM-III* (1980) the general definition of sexual deviation was abandoned and a new definition as supplied of homosexuality as a mental disorder. Only "egodystonic homosexuality," defined as "a desire to acquire heterosexual arousal . . . and a sus-

tained pattern of overt sexual arousal that the individual explicitly states has been unwanted," was treated as a mental disorder. *DSM-III*, P.281. The amendment was clearly a result of changing morals and conventions in the United States.

This interaction between general social attitudes and what seems appropriate for medical diagnosis is suggestive that what is classified as a mental disorder by the American Psychiatric Association is not necessarily a condition that a state is constitutionally required to take into account in assessing punishment. In the case of the condition described as an antisocial personality there is a substantial tension between the implications of its being seen as a "can't help" characteristic and what are the frequent accompaniments of this condition. The disorder, the American Psychiatric Association observes, often leads to "many years of institutionalization, more commonly penal than medical." *DSM-III*, p.318. In adulthood those with this condition are marked by a "failure to accept social norms with respect to lawful behavior." *Id.*

Zant suggested that "mental illness" might actually militate in favor of a penalty less than death. The "mental disorder" of such antisocial personality is not "mental illness" in the sense used by *Zant*. For the ordinary citizen it would, to say the least, be paradoxical that a person who was likely not to accept social norms with respect to lawful behavior should be treated more kindly than the person who was law-abiding. The paradox is all the stronger when it is the view of the American Psychiatric Association that persons with this condition are capable of understanding the consequences of their actions and are willing to perform or not to perform particular volitional acts. We may go further and say that it is diffi-

cult to suppose that there are any persons who commit the kind of vicious crime for which the death penalty is now imposed in this country who do not possess one or more of the personality disorders or one or more of the neuroses recognized as mental disorders by the American Psychiatric Association. To hold that each of these conditions must be a mitigating factor when the death penalty is considered would be to undermine the death penalty under the guise of acknowledging that what the American Psychiatric Association finds to be a mental disorder must be treated as a factor that calls for less severe punishment than death. We cannot say that the evolving standards of decency that have characterized interpretation of the eighth amendment require a state to conform its scheme of capital punishment to such a norm.

With these amendments, the panel has voted unanimously to deny the petition for a rehearing and to reject the suggestion for a rehearing en banc.

A judge in regular active service requested a vote to determine whether to rehear this matter en banc. A majority of judges in regular active service voted against a rehearing en banc.

The mandate shall issue forthwith.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

ROBERT ALTON HARRIS,

PETITIONER,

v.

R. PULLEY, WARDEN OF SAN QUENTIN,

RESPONDENT.

PROOF OF SERVICE

I, the undersigned, say that I am over 18 years of age, a resident of the State of California and not a party to the within action;

That my business address is 1010 Second Ave., Suite 1601, San Diego, California 92101;

That I served the within Petition for a Writ of Certiorari by mailing a copy on this date to:

Attorney General John Van de Camp
ATTN: Deputy Attorney General Louis Hanoian
110 West A Street, 7th Floor
San Diego, CA 92101, and

I certify under penalty of perjury that the foregoing is true and correct. Executed on this th day of November 1989 at San Diego, CA.
